SEXUAL OFFENCES AND YOUNG COMPLAINERS: SEXUALITY, CHARACTER AND CONSENT

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DECLARATION

In submitting this thesis for examination, I, Michele Burman, hereby affirm and declare that :

1. **I have composed this thesis in its entirety and**

2. **It is entirely my own work**

Michele Burman

The idea for this thesis, as well as the opportunity to observe cases in court, arose out of a Scottish Office funded research project, which monitored and evaluated the use of s.s. 141/346 of the Criminal Procedure (Scotland) Act 1975 as inserted by s.36 of the Law Reform (Miscellaneous Provision) (Scotland) Act 1985. This legislation introduced restrictions curbing the use of sexual evidence in sexual offence trials. The results of this research were published as a Scottish Office publication, namely Brown, B., Burman, M. & Jamieson, L. (1992) *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* Edinburgh, The Scottish Office Central Research Unit Series. The following year, a book on the research was published as Brown, B., Burman, M. & Jamieson, L. (1993) *Sex Crimes on Trial* Law and Society Series, Edinburgh University Press.

This thesis has a rather different focus to the Scottish Office funded research and is entirely my own work. However, of necessity there is some overlap with the published research. This is particularly the case with Chapter Four of this thesis which outlines the precursors to and the intentions of the Scottish legislation. The use of this material, albeit written and presented in a different form to that in the published research has been agreed to by both of the other authors, Beverley Brown and Lynn Jamieson.

Dr Beverley Brown **Dr Lynn Jamieson**

ABSTRACT

This is an empirical research study of contemporary court room practices in Scottish sexual offence cases where the complainer is a young female under the age of 17 years old. The data was collected primarily by means of in-court observation of 94 sexual offence cases heard in courts across Scotland over a three year period. The data includes both contested criminal trials where evidence was led, and also 'guilty plea' cases where the accused pled guilty in advance of a trial and no evidence was led, but where there was a plea in mitigation by the defence on behalf of the accused.

This study explores how the question of young female sexuality is perceived in the court room. Sexual offence cases involving young complainers constitute a key site for investigating a series of ambivalences about the sexuality of young women and girls, wherein it is simultaneously seen as a source of danger and a focus of protection. Specifically, the study is concerned with the use of sexual evidence. It describes the trial processes of examination and cross-examination, and the giving of evidence by young female complainers. In particular, it documents the ways in which sexual evidence is introduced by means of representations that draw on images of female sexuality. By so doing it shows the ways in which ideas about young female sexuality pervade the court room in the processing of sexual offence cases.

In searching for the ideological basis of contemporary court room rhetoric in such cases, the study locates the late 19th century as a time when prevailing ideas about young female sexuality became incorporated into legislation which raised the female 'age of consent' and created a set of statutory sexual offences which, virtually unchanged, forms the cornerstone of contemporary sexual offence legislation in Scotland..

In addition to documenting sexual evidence, the study is also concerned with the *use* to which such evidence is put in the trial. Centrally, it examines the relationship between the images of young female sexuality to the crucial legal questions of the relevance, admissibility and deployment of evidence, and the substantive elements of the sexual crimes and offences which are the subject of the criminal trial. Currently, Scottish legislation limits the use of sexual history and sexual character evidence concerning the complainer, unless such evidence is deemed relevant to issues in the trial and it is against this development that the use of such evidence is assessed.

ACKNOWLEDGEMENTS

Researching and writing this thesis has been a long, hard haul. At times it felt as if it would never materialise. That it did, finally, is due to several people, and I am very pleased to be able to thank them. My deepest gratitude is to Dr. Beverley Brown who supervised my efforts throughout. Without her patience and encouragement, her wisdom, her incisive comments, invaluable advice, and general cracking of the whip I doubt whether this would have been finished. I am grateful also to Dr. Lynn Jamieson for her scholarly advice and her belief in me. Together with Beverley Brown she was responsible for employing me as researcher on the Sexual History Evidence Research Project funded by The Scottish Office which provided both the idea and the impetus for this thesis. I have learnt an immense amount from my association with Beverley and Lynn and my intellectual debt to them both is huge. My thanks also go to Dr. Peter Young for his kind support and wise words over the years. Also I must thank Dr. Neil Hutton who has lived through this thesis with me. His patience, constructive criticism and consistent enthusiasm sustained me, especially in the final frenetic stages before completion. Finally, I acknowledge with gratitude and respect all those young women and girls who bravely took the stand in court to recount their ordeal, and allowed me to witness it.

Michele Burman
Cape Town, October 1995

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INTRODUCTION

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The Research Study

This study examines the depiction of young female complainers[1] (aged 17 years and under) in criminal trials for sexual offences in Scotland. It is concerned with the question of their sexuality, and specifically with the ways in which it is invoked, developed and deployed in the trial by the use of images that draw on stereotypes and stories of (young) female sexual behaviour. At one level it seeks merely to document these images of young female sexuality that float - and are secured - through legal rhetoric in the court room. At this level, the thesis describes the trial process of examination and cross-examination, and the giving of evidence by young female complainers. It is thus a study of contemporary court room practices in sexual offence trials. But, centrally, it is concerned with the use to which evidence is put in the trial, and seeks to examine the relation between the images of young female sexuality to the two, inter-locked, legal questions of, on the one hand, the admissibility and deployment of evidence, and on the other hand the substantive elements of the various sexual crimes and offences which are the subject of the criminal trial. The most crucial of these legal questions is that posed by the question of sexual character evidence and the way that it is applied to particular issues in the trial.

A main concern of the thesis is with the ways in which evidence about the young female complainer - in particular information about her character, her lifestyle, her reputation and specifically her sexuality - is elicited and the ways that information is deployed in the court room to construct a particular picture of the complainer, and the manner in which she is presented in relation to the sexual offence which forms the substance of the charge. The thesis examines the way in which constructions of the complainer draw on prevailing social stereotypical images which pretend to represent typical or ideal characteristics of young female sexuality. Opinions and behaviour based on the implicit assumptions which underpin gender stereotypes are to be found in many social spheres and - as will be argued here - conventional and exaggerated stereotypes of (young) female sexuality and the generalisations which they embody are also to be found in the court room. As Sharpe

[1] 'Complainant' in England and Wales

(1976) has pointed out in a different context, social stereotypes of female behaviour are based on intangible and abstract ideas which make analysis and discussion of them elusive.[2] Similarly, Lees (1993) has argued that gender stereotypes are difficult to pin down to any specific content that could be shown to be false because of the ambiguity with which they are used and the refusal to allow any exceptions.[3] In the court room gender stereotypes and their symbolic use are prevalent, although it appears that there is not one stereotypical image of female sexuality present, but several. Furthermore, they are not fixed and immutable images, but often ambivalent and floating, and thus in part they demonstrate the characteristic intangibility referred to by Sharpe (1976).[4] However, in the court room the floating stereotypical images that are present are captured and channelled by legal rhetoric and gain significance through their application to particular evidential issues in the trial. It is important to state that these images are multifunctional in that they may be applied - most commonly by the defence, but also at times by the prosecution - to a number of different, yet inter-linked evidential issues during the course of the trial. Thus whilst the basis of the stereotypes remain intangible, their application to key evidential issues in the trial provides one possible explanation for their prevalence in the court room. This thesis examines the process in which, in a trial, these floating images are pinned down by and channelled primarily through the legal concept of sexual character and applied, in particular to the crucial issue of consent, but also to the issues of the reliability and credibility of the complainer. In this way it is a study of the way in which particular sexual ideologies, presumptions and images about young female sexuality and behaviour underpin and infuse the evidential process in sexual offence trials.

Several writers have shown that the social construction of young female sexuality involves the construction of difference (Sharpe, 1976; Jackson, 1982; Lees, 1993). The construction of difference operates on two levels. On one level, difference is constructed on the basis of gender wherein the sexuality of girls is subordinate to that of boys. This gender difference is articulated as, for example, 'it is natural for boys to enjoy sex, but not for girls.' But on another level, difference is constructed *between* girls. As Lees (1993) states:

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[2] Sharpe, S. (1976) *'Just Like a Girl ' How Girls Learn to be Women* p.66-70

[3] Lees, S. (1993) *Sugar and Spice : Sexuality and Adolescent Girls* p. 58

[4] Sharpe (1976)

> "The construction of female sexuality involves the construction of a difference between slags and drags: sexuality, presumed to be promiscuous in nature, is not natural for all girls/women but only resides in the slag."[5]

It is the dichotomisation between girls - that is, between those who are chaste and those who are promiscuous which is of prime interest here. These are the basic conventional stereotypes of young female sexuality, that of the innocent and pure 'good' girl who requires to be protected from the dangers of sex, and the promiscuous and loose 'bad' girl who constitutes a danger from which others should be protected. As many feminists have argued, the use of binary opposites such as good/bad do not merely construct an understanding of difference, they also construct different values by which such differences are viewed (Smart 1995). The polarisations of 'good' and 'bad' which underpin images of *girls who do* and *girls who don't* is echoed in the concept of 'character'. On one level, character is a means through which individuals are socially constructed. Characterising an individual is a method of identifying and labelling that individual. However, character is also a recognised legal concept, again underpinned by the polarisations of 'good' and 'bad', and is used to suggest certain distinctive qualities or propensities in an individual, such as a disposition towards certain sorts of conduct. Within the context of sexual offence trials, legal rhetoric constantly reproduces this dualistic frame of reference of 'good' and 'bad', of vulnerable sexuality and threatening sexuality, through the concept of sexual character. In the court room, sexual character is the cipher through which the meaning of female sexuality is constructed, and the meaning is conveyed through the use of stereotypical images.

Sexual offence trials provide a key site for investigating a series of ambivalences about young women's sexuality - as a latent but ever present dangerous potential; as an object of vilification; or as the focus of protection. This thesis explores how young female sexuality is perceived in the court room; it attempts to ascertain whether it is viewed in the same way as adult female sexuality, or whether it possesses some specificities of its own. Although this is, in essence, a study of contemporary court room practices it includes an overview of the legal position of young women and girls in relation to their capacity to consent to sex,

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[5] Lees (1993)

and then continues with an historical account of the nineteenth century statutory sexual offence legislation governing sexual behaviour of young women and girls which, virtually unchanged, informs contemporary sexual offence statutes in Scotland. Investigation of the historical background to contemporary statutory sexual offence law locates the dominant ideology in relation to the sexuality of young women and girls at the time of the creation of the statutes and provides a further source of information and to some extent an explanation of the ideological basis for the courtroom rhetoric that is typically deployed in contemporary sexual offence trials.

The Formulation of Research Questions

My interest in images of young female sexuality within the context of sexual offence trials was particularly focused by the development of law reform in the mid 1980's when Scotland introduced legislation which limited the use of sexual evidence concerning the complainer in sexual offence trials.[6] This is evidence concerning a complainer's sexual experience or character, and may be either general evidence concerning a 'type' of person or may be evidence which refers to particular events in that person's past. Such legislation is commonly known as 'shield' legislation, so called because it 'shields' complainers in sexual offence trials from intrusive or unnecessary questioning about their personal lives, and has been introduced in several jurisdictions around the world over the last twenty years or so.[7] In most of the jurisdictions in which reforms have been introduced, the workings of the 'shield' legislation has been the subject of evaluation and analysis.[8] Similarly, the Scottish legislation was the focus of a Scottish Office funded research project[9] which examined the

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[6] Namely s.141 and s.346 of the Criminal Procedure (Scotland) Act 1975 as inserted by s.36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

[7] In Canada, some Australian and North American states, New Zealand and England/Wales (ss2 and 3 of the Sexual Offences (Amendment) Act 1976)

[8] see , for example, Adler, Z. (1987) Rape on Trial ; Temkin, J. (1987) Rape and the Legal Process

[9] The 'Sexual History Evidence Project' conducted at the University of Edinburgh 1987-1990. This research had two main aims; the first was to monitor the use of the legislation and examine how questioning and evidence concerning the complainer's sexual history and sexual character was being used under the new provisions. The second aim was to assess the effectiveness of this legislation in securing it's objectives. The research findings were published as Brown, B. , Burman, M. and Jamieson, L. (1992) *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials : A Study of Scottish Court Practice under ss.141A/141B and 346A/346B of the Criminal Procedure (Scotland) Act 1975 as inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s.36*

use and effectiveness of the 'shield' legislation. I was a member of the research team, and the germ of the idea for this thesis arose whilst I was conducting this research. [10]

The reform represented by the 'shield' legislation was the culmination of a lengthy period of discussion and consultation conducted by the Scottish Law Commission. This stemmed from a concern with the problematic consequences of sexual evidence, and a number of quite different reasons were given throughout the period of deliberation and drafting for restricting the use of evidence concerning a complainers' sexual life. Briefly - because the formulation of the problems is something to which I shall return to discuss in more detail later in the thesis - these were the problems of the distress caused to the complainer by embarrassing questioning; the possibility that offenders were evading justice due to the unwillingness of victims to report sexual offences to the police because of fear of the court room ordeal; and the possibility of overly light sentencing due to the potential that sexual evidence may have for influencing a jury. The other reasons which were given for restricting sexual evidence concerned issues of evidential principle. These were, first, the dangers of inferring a complainers credibility on the basis of her sexual conduct; second, the invalidity of using a complainer's sexual character in order to show a predisposition to consent; and third, the possible conflation of sexual character evidence and consent by a jury.

The Scottish legislation, like that of other jurisdictions, does not totally prohibit sexual history and sexual character evidence, but lays down certain conditions and procedures for introducing such sexual evidence if it fulfils certain specified conditions. However, the Scottish legislation has a number of distinctive features which distinguish it from other forms of 'shield' legislation found in other jurisdictions. It is in fact unusually wide-ranging

[10] It is important to state from the outset that the Scottish Office funded research was not concerned directly with the investigation of sexual offence trials involving young complainers, rather it had a somewhat different focus being concerned primarily with the use of the 'shield' legislation more generally. In addition, it was not immediately clear when commencing The Scottish Office research, that sexual evidence and/or the 'shield' legislation would feature all that greatly in trials involving young complainers, and there was a general implicit presumption, both by policy makers within the Scottish Office who funded the research and, to a degree, by the research team, that the research would be more concerned with rape trials involving adult complainers.

in terms of the sexual crimes and offences which fall within its remit.[11] Because of this it applies in both the High[12] and the Sheriff[13] courts in Scotland. It is not restricted to rape and rape-related offences, but covers a much wider range of sexual offences, many of them defined either formally or informally in terms of the (young) age of the victim. In these sexual offences, it is the *age* of the victim which, effectively, constitutes the crime. Interestingly, there is very little discussion in the debates or discussions leading up to the passing of the legislation concerning why those sexual offences which specifically apply when young victims are involved are also covered by the legislation. Rape trials involving adult women were cited throughout the discussions as the paradigm instance, hence it was difficult to avoid the impression that the inclusion of other sexual offences, in particular those that specifically involve young victims were simply added-on. The inclusion of sexual offences which involve young complainers within the remit of the 'shield' legislation presupposes, in the first instance at least, that the problems that were perceived by the reformers to be posed by the use of sexual character and sexual history evidence in the investigation of complainers' sexual lives might potentially be found in sexual offence trials which involve young complainers. Whilst this possibility was not *explicitly* stated in any of the debates and discussions which preceded the passing of the legislation in which the 'problems' of sexual evidence were formulated, sexual offences which involve young victims, by their very inclusion in the remit of the legislation are *implicitly* problematised in the same way as sexual offence trials involving adult complainers. Thus an initial research question for the thesis was whether evidence which constituted undue questioning about complainers' sexual lives was in fact being used in sexual offence trials involving young female complainers and, if so, what form the sexual evidence took in such trials. A second, and related, question was whether the 'problems' of sexual character and sexual history evidence as perceived by the law reformers and which informed the design and drafting of the 'shield' legislation were present in trials involving young female

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[11] It includes both heterosexual and homosexual offences, thus the complainer may be male as well as female, as indeed may be the accused.

[12] This is the highest level of court of the first instance in Scotland. Rape trials always take place in the High Court. Trials are presided over by a judge with a 15 person jury (known as solemn procedure).

[13] This deals with crimes and offences which are less serious than the High Court although some borderline charges may be dealt with at either level. The Sheriff Court includes both the possibility of a trial presided over by a sheriff with a jury (known as solemn procedure) or trial by sheriff sitting alone (summary procedure)

complainers. If so, were these the 'same' problems as those in trials involving adult female complainers or were they different in some way ?

Although the scope of the 'shield' legislation is unusually wide, it does not cover the crime of incest or any of the offences under the Incest and Related Offences (Scotland) Act 1986 which relate to breaches of trust and authority.[14] Furthermore, such charges are often given as alternatives on the indictment to crimes and offences which in fact are covered by the legislation. This is particularly so in relation to rape and offences under the Sexual Offences (Scotland) Act 1976 and it is not at all uncommon to find sections of this Act given as alternatives to incest on the indictment. This could have much to do with factors such as the strength of the available evidence and sentencing limits, however it also gives rise to the possibility that there may be similarities in the type of evidence that may be introduced in such cases. The exclusion of incest offences from the ambit of the 'shield' legislation was therefore somewhat anomalous. This prompted a third research question, that of whether trials for incest offences which involved young complainers demonstrated the use of sexual evidence, and if so, what form this evidence took in such trials.

However, it was not the sole intention of this research to merely monitor sexual evidence or measure the use of the 'shield' legislation in sexual offence trials involving young complainers. A central theme and puzzle which quickly emerged was the focus on the complainer's consent to sex when consent is technically not at issue in such trials. This is because, in Scots law (as in English law) girls below a certain age do not have the *capacity* to consent and, for older girls, even where they do have the capacity to consent, that consent is rendered *irrelevant*.. How and why this focus on consent occurs is another key concern of this investigation.

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[14] Although one submission did specifically recommend the inclusion of incest, discussions with legal practitioners and those responsible for drafting the legislation revealed the view that the omission of incest and incest related offences was probably due to an oversight. This oversight may be amended, however as following the publication and dissemination of the Scottish Office funded research into the workings of the legislation, the Government is considering bringing forward proposals for extending the provisions of the legislation to incest and clandestine injury crimes (another sexual offence to which the legislation did not apply), as stated in the White Paper entitled *Improving the Delivery of Justice in Scotland : The Government's Proposals for Reform*, 1994

Research Questions

To sum up, the main sets of research questions which this thesis tries to address are as follows. One set of research questions concern the construction of images of young female sexuality which pervade sexual offence trials and their relationship to legal-evidential issues in the trial. A second set of research questions cohere around the 'shield' legislation, and specifically whether evidence which constitutes undue questioning about complainers' sexual lives is in fact being used in sexual offence trials involving young female complainers and, if so, what form the sexual evidence takes in such trials; whether the 'problems' of sexual character and sexual history evidence as perceived by the law reformers and which informed the design and drafting of the 'shield' legislation are present in trials involving young complainers. If so, are these the 'same' problems as those in trials involving adult complainers or are they different in some way ? A third set of questions concern the predominance of the issue of consent in sexual offence trials. Why is the issue of consent being used ? What effect is it aimed at producing ?

A Word About Age

One of my first research tasks for this thesis was to define what I meant by 'young' female complainers. Parameters had to be set. A second task concerned whether to include only those sexual offences which specifically involve young complainers, for example, the age-defined statutory offences, or to also include those sexual offences which could be applied in cases where the victim is an adult, such as rape, attempted rape and indecent assault. These first two tasks were tackled together. I did not want to restrict the research to only those cases involving young children, nor extend it beyond where the significance of 'young' may become lost. The legal age of consent to sex for females in Scotland is 16 years, and in Scots law some sexual offences are defined in terms of the age of the victim, such as the age-related statutory offences which refer, for example, to sexual offences against girls aged under 13 years; against girls aged under 16 years; and indecent behaviour towards a girl aged between 12 years and 16 years.[15] However, whilst I did not want to set an arbitrary age-limit, I did not want to be bound to the letter of the law, either. I wanted to 'snare' those cases involving young complainers which fell outside of the age-limits defined by the statutes, and also include rape and rape-related offences usually associated with

[15] s.s. 3, 4 and 5 of the Sexual Offences (Scotland) Act 1976

adult victims. This would provide some comparison in terms of different types of sexual offences, and would widen the scope for investigation into the use of sexual evidence. Thus I decided on an age-limit of 17 years. This would enable me to include all of the offences against children and younger teenagers, but would also allow the inclusion of cases involving 'young' complainers which fell just outside the age-limit as set by the statutory offences and age of consent law.

Literature

An initial search of the literature revealed that there is relatively little written on images of young female sexuality and their relation to the central legal questions that are at issue in the context of sexual offence trials, nor on the issue of girl's consent to sex. It seems that literature in this area falls between several stools: that is, literature which focuses on the construction and social control of female sexuality within the law (for example, Edwards, 1981; Smart 1989); the mainly feminist literature which documents the ordeal of victims in sexual offence trials (Adler, 1987; Estrich, 1987) ; the substantial body of child protection literature which focuses on child sexual abuse (Rush, 1980; Ward, 1984; Driver & Droisen, 1989); the criminological literature on young women as offenders (Carlen, 1985, 1988; Hudson, 1989; Gelsthorpe, 1989); and the literature on the sexuality of young women (Jackson, 1982; Lees, 1986, 1993;). Whilst there has been a growing body of sociological literature which has the sexuality of young women as its focus this has not, as yet, taken up the role played by constructions and images of young female sexuality in sexual offence trials.

Much of the literature on rape trials focuses on the experience of adult women victims. In rape trials, the victims of such offences are often subjected to extensive questioning not only about the events which led up to the alleged offence, the offence itself, and the aftermath of the offence, but also - and controversially - about aspects of their personal and sexual lives. It has been well-documented that the legal process, and the necessary standards and requirements of evidence are as traumatic for the victim of a sexual offence as the initial victimisation (Adler, Z. 1987, 1988; Chambers & Miller, 1983, 1986). This is true as much for the younger victim of sexual offences as it is for adult victims. As Adler (1988) points out, for younger victims the court apperance may create secondary

victimisation on a considerable scale.[16] The formal atmosphere of the court room and the evidential requirement to relate the details of the alleged offence, the confrontation with the accused and the ordeal of cross-examination contribute substantially to the trauma of the trial situation. When the accused person is a member of the young person's family, this trauma may be exacerbated as children in this position are also likely to experience conflict, confusion and guilt.[17]

The issue of the consent to sex of young girls appears to have received relatively little attention from legal writers. Sex with children is prohibited in law, and this is due primarily to the perceived potential for harm and exploitation. Of course, legal texts give legal definitions and offer a explication of the legal criteria involved in consent, but the issue of the *meaning* of consent in the commission of sex with girls and young women rarely is the subject of analysis. As a result, the stature and meaning of consent and its implications for the use of evidence in sexual offence and incest trials tends to disappear because it is often subordinated to an understanding of rigid legal criteria.

Whilst it is well-recognised and documented within feminist literature, for example, Berger (1977), Adler (1987), Chambers & Millar (1986), Estrich (1987), Temkin (1987) that the issue of *consent* tends to be a crucial issue in rape trials involving adult women, and that such trials tend to be dominated by arguments which focus specifically on whether or not the complainer in fact consented, there is no indication that the same applies in trials involving young complainers. The meaning of young girl's consent to sex has not been the subject of much detailed discussion within feminist literature. This was puzzling precisely because the issue of consent, in particular presumptions of 'automatic' or generalised consent along the lines of that outlawed by law reform in many jurisdictions around the world, has been the subject of much critical feminist attention where it relates to adult women. Legal rhetoric and jurisprudence has inextricably bound up the question of consent with the rape of adult women, and thus feminist discussion of the issue of consent to sex stems largely from feminist accounts of rape. Such accounts have tended to focus on the question of male/female power relations, and largely take the form of critiques of male

[16] Adler, Z. (1988) 'Prosecuting Child Sexual Abuse : a challenge to the status quo' in Maguire, M. & Pointing, J. *Victims of Crime : A New Deal ?*" p.139

[17] Morgan, J. (1988) 'Children as Victims ' in Maguire, M. & Pointing, J. (eds) (1988)

sexuality. For example, Smart (1989) speaks of women in rape trials being found "guilty of consent." She depicts the rape trial as a process whereby women's experience on a number of levels (their sexuality, their bodies, their unwillingness to have sex) is 'disqualified' and phallocentrism is 'celebrated'.[18] Specifically, women's experience is denied and disqualified by a process in which rape is transformed throughout the trial into 'normal sex'. For Smart (1989) the legal consent/non-consent dyad which is often the pivot of the rape trial is problematic in terms of women's subjective experience of sex. In a rape trial, a woman must show beyond all reasonable doubt that she was unwilling to have sex and that she did not enjoy it. But the 'telling' of a rape story may reveal ambiguities which fail to meet the legal criteria of non-consent. At the same time, a rape trial reaffirms a phallocentric view of sex (natural male sexual need and female sexual capriciousness) which disqualifies women's experience of sexual assault.[19] Adler (1987) also points to the way in which women can be found 'guilty of consent' in rape trials. She shows how a woman's experience of sexual assault is denied and invalidated and her lack of consent is rendered immaterial in the trial by the use of 'common sense' notions of male and female sexuality.[20]

Theoretical work from feminist writers in the area of child sexual abuse began to be published in the early 1980's, for example Rush (1980), Nelson (1982), Russell (1986) and Driver and Droisen (1989). Personal accounts from incest survivors also began to appear, for example, Ward (1984) and Spring (1987). Where this literature refers specifically to young victims, it tends to do so in terms which raise awareness of the numbers of children who experience sexual abuse, and about the social and emotional harms of the experience, and the need for children to be protected from such harms. Where the issue of consent to sex with regard to young girls has been given some attention is in relation to child sexual abuse within the family. Here, the question of consent is addressed from a social work protectionist/welfarist perspective that is concerned with the exploitation of the child. Underlying such views is the notion that sex between adults and children is inherently harmful in itself. Children require protection from harm due to their immaturity and ignorance, but also they require protection from the perversity of premature carnal indoctrination. Emily Driver (1989), for example, maintains that absence of consent is

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[18] Smart, C. (1989) *Feminism and the Power of Law* chapter two
[19] ibid. p.35
[20] Adler, Z. (1987) *Rape on Trial* p10-11

crucial to the definition and understanding of child sexual abuse because it allows a clear stand to be taken on the exploitation of the child. Thus she is in favour of a general, blanket lack of consent, rather than a situation in which consent is negotiated on each individual occasion. This mirrors in many ways the legal position as it is represented in age of consent law. For Driver (1989), lack of consent stems from the child's relative ignorance of the implications of adult sexuality and from absence of any real choice in a relationship where children are forced to rely on adults for their well-being.[21] This absence of choice arises because children lack the knowledge and the freedom to give or refuse their consent independently. David Finkelhor (1979) takes a similar stance, positing that a main argument against sexual relations between adults and children is that "the fundamental conditions of consent cannot prevail in the relationship"[22] precisely because children are of unequal status to adults.

Recent years have also seen the emergence of writings on the investigation of child sexual abuse from the perspective of multi-agency investigative practice where there has been increased attention on the ability of young people to recall and describe events (Conroy, Fielding & Tunstill (1990), Waterhouse & Carnie (1990), and Burman & Lloyd (1993). There has also been a growing body of work on the evidence of children from the perspective of prosecutorial practice, such as that by Murray & Gough (1991), and Dent & Flin (1992) which is concerned with the testimony of children in criminal trials and the competency of the child witness in the court room.

Contribution of Thesis

This thesis makes an original contribution to the body of feminist work that is concerned with the way that female victims of sexual assault are treated by the law and in the criminal justice system. This study is in effect a study of the social construction of sexuality, and specifically about the ways in which the sexuality of girls and young women is construed and spoken about in court room discourse. Thus it also makes a contribution to the corpus of writings on the sexuality of girls and young women. The thesis documents the ways in

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21 Driver, E and Droisen, A. (eds) (1989) *Child Sexual Abuse : Feminist Perspectives* p4

22 Finkelhor, D. (1979) 'What's Wrong with Sex between Adults and Children?' *American Journal of Orthopsychiatry* vol 49, 4

which ideas about female sexuality get produced and reproduced in the legal system, It is about the ways in which assumptions, myths, images and stereotypes of female sexuality inform court room rhetoric about patterns of sexual behaviour and sexual morality and, in particular, about the ways in which these presumptions and myths are used to sustain the idea of appropriate behaviour by young women and girls.

Research Methods

The Field Work

This section briefly sets out the two research methods utilised in the collection of data for this thesis. Full details of the research data and findings are contained in Chapter Five. The first, and main method, involved in-court observation of sexual offence and incest cases which involved young female complainers under the age of 17 years. Observation of a total of 92 cases was carried out in Sheriff and High courts across Scotland during 1988 to 1990. Although sexual offence trials are open to the public, the court is cleared when the complainer takes the witness stand. Permission was obtained from the court authorities to attend cases and remain in court during the complainers evidence. Permission was also sought to remain in court in each individual case from the complainer via the prosecution. Detailed notes of the proceedings were taken throughout the trial, and as far as possible the proceedings were recorded verbatim. The notes were transcribed and then coded and analysed using the Ethnograph computer software package which is designed to assist analysis of qualitative data.

The Interviews

During my time in the courts, I had many opportunities to speak to those who work in the courts. Whilst attending trials, it was often possible to have informal conversations with court officials, defence lawyers, procurator fiscals[23], advocate deputes[24] and defence advocates, either after the trial or during periods of recess. Thus it was often possible that any queries I had regarding court procedure, or any specific or general legal detail could be answered by them there and then. But in order to learn more of their attitudes and

[23] Procurator fiscals are qualified solicitors employed as Crown servants who prosecute on behalf of the Crown

[24] Advocate deputes are practising advocates who examine all cases reported to Crown Office with a view to solemn proceedings and who prosecute cases in the High Court

perspectives and hence more of what informed their practice in sexual offence trials involving young complainers, I wanted the opportunity to speak to them in a more focused way, particularly about some of the research findings which had arisen from the period of court observation. A sample of 33 legal practitioners (judges, sheriffs, defence advocates, advocate deputes, fiscals and defence lawyers) who had experience of sexual offence trials had been drawn and had agreed to be interviewed as part of the Scottish Office funded research. It is important to state that the interview questions for that research did not focus on young complainers in any way. I conducted 28 of those semi-structured interviews, and, with the agreement of the other members of the research team, I included in the interview schedule some questions specifically designed to explore issues relating to young female complainers. This series of interviews comprise the second research method employed.

Document Analysis

The research included scrutiny of nineteenth century law reports, and contemporary legal texts. It also included the scrutiny of the Criminal Law Amendment Act 1885 and associated legal commentaries of the time, and the more recent s.36 of the Law Reform (Miscellaneous Provision) (Scotland) Act 1985 as well as the Parliamentary debates and the consultation documents of the Scottish Law Commission which accompanied its passing.

Summary of Chapter Contents

Chapter One focuses on the question of consent to sexual relations and the way that it is posed in Scots law in relation to young people. It describes the status of young people in terms of their capacity to consent and explores the rationales for non-consent which inform thinking in this area. The chapter also includes an historical account of the nineteenth century statutory sexual offence legislation governing sexual behaviour of young people.

Chapter Two provides a brief outline of the sexual crimes and offences that formed the basis of the research, that is, those sexual offences covered by the legislation and those incest offences which were included - and notes some characteristics of the law in relation to these offences .

Chapter Three describes some of the principles of advocacy and some general legal and procedural features of the Scottish adversarial system, with a particular emphasis on the rules of evidence. It focuses on the link between the exercise of due process in the criminal court room and the use and function of evidence in criminal trials. It thus provides a context for the empirical research findings .

Chapter Four traces the developments that led to the 'shield' legislation, and examines the problems of sexual history and sexual character evidence that the 'shield' legislation intended to address as a means of introduction to the possible problems that may be encountered in sexual offence cases involving young complainers.

Chapter Five sets out the main characteristics of the sexual offence cases that formed the research data and details of all cases, with charges, verdict and sentence.

Chapter Six reports the results of the observation of contested trials. It focuses on the processes by which sexual character is ascribed to the young complainer, and in particular, the way that this is done in the trial through the evocation of images and stereotypes of female sexuality.

Chapter Seven also contains research findings, but is primarily concerned with the construction of the consenting young complainer, and specifically with the way in which the issue of consent is used in relation to key evidential issues in the trial.

Chapter Eight draws on research data from contested trials and from guilty plea cases and also from interviews with legal practitioners to provide an analysis of the pleas in mitigation in sexual offences trials involving young complainers which were given in order to obtain a lesser sentence.

Chapter Nine summarises the research study, draws together the main research questions and looks at some of the implications of the focus on female sexuality and the use of sexual evidence.

Appendix I consists of details of each observed case and supplies details concerning the court at which the case was heard, the age of the complainer, the charges, verdict and sentence.

Appendix II contains s.36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

CHAPTER ONE

AGE AND NON-CONSENT : LAW'S TWO RATIONALES

This chapter focuses primarily on the questions of consent and non-consent to sexual relations and the way they are posed in Scots law in relation to girls and young women. In the case of girls below a certain age, non-consent to sex is a matter of law rather than a matter of fact. An examination of consent and non-consent as it relates to young women and girls is an important place to begin any consideration of the construction of young female sexuality in the court room. This is because consent either explicitly or implicitly constitutes one of the main fulcrums around which much of the legal argument in the trial takes place. The complainer's age in relation to the age of consent is a defining factor in the way in which an alleged offence is defined and hence argued in the trial. (Non) consent is often a key evidential issue, yet as will be argued later in this thesis, the focus on consent is somewhat paradoxical in trials involving young complainers. Furthermore, in the court room ideas and conceptions about childhood and appropriate sexual behaviour tend to cohere around the issue of consent .

The first part of the chapter introduces the two rationales which underlie and inform thinking in relation to consent and young people. The rest of the chapter explores these underlying rationales in more detail, by focusing first on the law in relation to the competency of young people in legal matters, and second by focusing on the social and political developments of the last century which presaged changes to the status of girls and young women in relation to their consent, and which led ultimately to the raising of the female 'age of consent'. The 19th century is where the current statutory provisions regarding sexual offences had their genesis, and many of the present laws regulating sex with girls and young women were framed during this time, in a social and moral climate quite different from that which prevails today.

Consent and Non-Consent

Consent is a major factor in sexual offences, although it is most usually associated with the crime of rape where it is bound up with the definition of the crime. Although the *meaning* of the term remains "unexplored by the courts"[1] a minimum condition of consent in sexual matters is that the person concerned must *understand* the nature of the act that has been committed upon them. Legal writers[2] also point out that this entails understanding not only the overt

[1] Gane, C. (1992) *Sexual Offences*
[2] ibid.

physical act, but also having an understanding of the wider context of the act, which goes beyond the physiological dimension. What is required is a full appreciation of its implications as a *sexual* act.

In order to be valid, consent must be freely given. That is, it must be given in the absence of fear or threats. To properly consent, one must have what amounts to a free, informed and unconstrained choice in the matter. Being forced to consent out of fear or harassment is not the same as having a free and informed choice. Neither is simply *allowing* intercourse to take place as the woman may allow intercourse out of fear, or may be unable to resist.

In sexual offence trials, the issue of consent is treated in court as a question of fact - did she consent or did she not consent ? Consent is a crucial factor in rape trials - the prevailing definition of which is genital penetration of a woman by a man against the woman's will. Consent to sex on the part of the complainer is an absolute defence to a charge of rape; where it is proved that sex between the complainer and the accused was consensual, the accused is deemed innocent of the charge and acquitted. The verdict of guilt or innocence often rests on the proving of non-consent, hence consent is often the most crucial deciding factor, and one that lies at the heart of the trial. Because of this, a claim by the complainer that sex took place in the absence of her consent is often the one aspect of her testimony that is most vociferously challenged by the defence during the trial. Non-consent is a necessary (although, on its own, not a sufficient) condition for a conviction on a charge of rape, and in a rape trial, it must be shown that sexual intercourse took place without the woman's consent. It is important to note that there is no onus on the accused to prove consent on the part of the woman. Rather, in the trial the onus is on the prosecution to prove that the woman *did not* consent.[3]

Yet there are some categories of victim who are deemed incapable of giving a true consent to sex, either because of their status, or their state of consciousness at the time that the sex occurred. These categories include those who are drugged or intoxicated - if one is unconscious one does not have a will ; those who are restrained or rendered incapable; the mentally handicapped and the mentally ill - who lack the mental capacity to consent; and children under the age of puberty who are precluded from having a consent because of their young age. In all of these circumstances, any apparent consent that they may give will not count as proper consent, freely given.

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[3] A relatively recent ruling (1982) validated that an accused who at the time of sexual intercourse reasonably or merely honestly believes that the woman consents cannot be convicted of rape, even though the woman did not consent in fact, *Meek v HMA* 1982 SCCR 613

In the deliberations leading up to the passage of the Scottish 'shield' legislation consent was posed as a problematic, yet key, issue in relation to the use of sexual evidence. Whilst the reformers specifically wanted to prohibit any suggestion that because a complainer had sex with A or B she would 'automatically' consent with C, they were also of the view that the question of consent may sometimes be a relevant issue justifying the admission of sexual evidence. In particular, they conceptualised *recent* sexual relations between the complainer and the accused as relevant to consent; and sexual relations with someone other than the accused as sometimes relevant to a defence of 'mistaken belief in consent'. The situations and circumstances where the reformers envisaged that consent may be relevant were all concerned with the crime of rape involving adult complainers. There was no discussion of consent in relation to young complainers. One 'obvious' reason for this may be that, because young girls are under the 'age of consent' then such discussion would be redundant. But the absence of any discussion concerning young complainers and consent still appears somewhat odd, given the inclusion of those sexual offences which specifically involve young complainers within the remit of the legislation.

Young People And Their Consent In Sexual Matters

In law, the question of consent to sex is differentially applied on the basis of age, and hence young people hold a different status to that held by adults in relation to their ability to give full and informed consent to sex.[4] In Scots law, young people are considered not to have a proper consent in relation to sexual matters. This lack of consent stems from two distinct bases. One, a basic legal incapacity due to young age, is found in the common law. This can be termed the *impossibility* of consent. The second basis, found mainly in statutory law, can be called the *irrelevancy* of consent, and springs from a welfarist doctrine of child protection. Both rationales render consent by young people invalid. Although offering what can be seen as largely contrasting perspectives on young people's lack of consent in sexual matters, the two rationales appear to have some points of convergence, most notably in relation to the underlying set of reasons which inform them, and also in relation to the perceptions of childhood knowledge and understanding and childhood sexuality which underpin them. However, these points of convergence may well be illusory, a result of looking at the rationales through opaque modern glasses which may serve to blur any inherent tensions and contradictions which may exist between them, or simply the will to rationalise law as it currently exists. The possibility that modern accounts tend to align the

[4] Other categories of people who do not have a true consent in relation to sexual matters are the mentally ill and the mentally handicapped, and those who have been drugged or intoxicated.

two rationales, suturing them together rather than acknowledging any ambivalences and points of difference will be explored throughout this chapter.

The Impossibility of Consent

The first and most fundamental basis of non-consent, impossibility due to young age, rests on the doctrine of non-competence. This is a much older strand of non-consent than that of irrelevancy, and hence is found mainly in common law. Non-competency due to age covers far more than sexual matters, and is not simply confined to sexual consent. The achievement of competence in a wide range of legal matters is directly linked to the attainment by a child or young person of a specific age. In a general sense, the legal status of children and young people in Scotland can best be understood in terms of a developing series of age-related steps or cut-off points which mark the transition of the child through various stages, each one bringing with it more legal rights and responsibilities, and allowing the child different degrees of competency and capacity in the eyes of the law.

Nor is competency in legal matters a concept that is found only in relation to criminal law. Indeed it is in other areas of law that the child's transition through degrees of competency is most noticeable. For example, in Scots civil law prior to 1991 there was a core distinction made between two main categories of young persons. These were 'pupils' (girls under 12 years old and boys under 14 years old) and 'minors' (girls between 12 years and 18 years, and boys between 14 years and 18 years). "Pupils' had no capacity to undertake any legally binding acts, such as making a will or entering into any contracts; however, they could be passive holders of, for example, property rights.[5] 'Minors' did have an active legal capacity but required the consent of a parent or guardian to enter into any legally binding acts. As from 1991, young people have to have attained the age of 16 years before they can enter into a legal contract (although there are some exceptions to this, such as giving consent to medical treatment, and consent to adoption).[6]

Under common law, children under the age of puberty (i.e. boys under 14 and girls under 12 years) are considered not competent to consent to sex. The common law 'age of consent' has its origins in Roman law under which young people (of both sexes) were considered to be the 'property' of their parents until they reached the age of 25 years, during which time they could be 'sold off' into marriage. The Romans recognised puberty as an age in which young people could become sexually active (and reproductive). Puberty was also the age at which

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[5] Clive, E. (1987) 'Children's Rights in the Scottish Civil Law' in Murray, K., & Wilkinson, J.E., *Children's Rights in a Scottish Context* National Children's Bureau, Scottish Group

[6] These changes to the civil law were implemented by the Age of Legal Capacity (Scotland) Act 1991 which also abolished the usage of the concepts of pupillarity and minority

young people could legally marry. Girls were seen to physically 'mature' earlier than boys[7] - and hence the age differential. Puberty then was the age at which young people gained the competency to consent to sex in Roman law. The Roman 'ages of puberty' have survived into contemporary Scots law, although the principles behind them have been somewhat eroded. Currently, it is not the parental property aspect which is the central concern in terms of a young person's consent to sex, rather it is because their consent is considered to be not fully or properly informed due to their young age. In a way then the older rationale for non-consent has been given a cognitive basis. In other words, a child under the age of puberty is deemed not to have sufficient maturity or understanding to consent to sex. Children are seen to lack the knowledge and experience to make a properly informed decision about the subject. This rationale is thus often presented as one of protecting those who are physically or psychologically immature from premature sexual experience. In many ways, this signals a fundamental shift from the property concerns articulated in Roman law towards a more contemporary concern with the protection of the child (and arguably indicates an influence from the welfarist concerns originating in the 19th century). Thus currently, even where a child under the age of puberty consents to sexual relations 'in fact', this is ignored in law, precisely because of the child's young age.[8]

As stated earlier in this chapter, legal writers also point out that consent in sexual matters is conditional upon the person concerned having a full understanding of the nature of the act that is committed upon them. What is required is a full appreciation of its implications as a sexual act. It is presumed that children lack this depth of fuller understanding because of their age and immaturity. Here the emphasis is on having a psychological or cognitive understanding of the meaning of the sexual act and the implications of the sexual act. There is a second set of related considerations implicit here, which relate to the validity of a child's 'consent.' Is consent really freely and independently given by the child ? Children may be easily influenced by adults to take part in sexual relations, perhaps because of a habit of obedience, or, to take Driver's (1989) point, because they are reliant upon adults for their well-being, or because 'they do not know any better' and for each or all of these reasons, their 'consent' to the sex is therefore legally ignored.[9]

To sum up, puberty brings with it a recognition, in the eyes of the law, of the *capacity* to consent in sexual matters and it thus becomes possible for a young person who has reached the age of puberty to consent to sex. To reiterate, girls obtain this capacity two years earlier

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[7] And possibly constituted an earlier profit in the marriage market as they could be sold off at a younger age

[8] Gane, C. (1992) *Sexual Offences*

[9] Driver, E. (1989) 'Introduction' in Driver, E. & Droisen, A. (eds.) *Child Sexual Abuse* p.4

than boys, that is at 12 years as opposed to 14 years (although it should be noted that this applies only to heterosexual and not to homosexual relations). However, although girls achieve this *capacity* to consent to sex at age 12, statutory intervention in the last century[10] rendered post-pubescent girls' capacity to consent to sex *irrelevant* until they reach 16 years. Here we see the two rationales meeting up. In effect the common law prohibition on sex with girls under the age of puberty was extended to older girls (between 12 and 16 years), and the question of post-pubescent girls to consent to sex was fundamentally and significantly altered by the passing of legislation. Whether the two rationales sit well together is another question which will be pursued later in this chapter.

The logic of incapacity can also be seen in terms of committing sexual offences. In terms of perpetration, children also become responsible for criminal acts when they reach a certain age. By s.70 of the Criminal Procedure (Scotland) Act 1975, the minimum age of criminal responsibility in Scotland is 8 years (for both males and females). This is two years younger than the age of criminal responsibility in England and Wales. Interestingly in Scotland, unlike England and Wales[11], there has never been any age under which male sexual potency is presumed impossible, so it is entirely feasible that a boy who has reached the age of criminal responsibility (that is, 8 years) can commit the crime of rape.[12] Hence, a male (of any age, as there is no presumption, as there is in English law, that a boy below the age of 14 years cannot achieve penetration) who has sexual intercourse with a girl under the age of 12 years commits the crime of rape (he also commits the overlapping statutory offence of 'unlawful sexual intercourse with a girl under 13 years').[13] This is so because of the fact that girls under the age of puberty are seen to be legally not competent to consent, nor of having a proper will in the matter at all.

The doctrine of competence also underpins the giving of evidence in testimony. Scots law, in many ways, is viewed as somewhat less restrictive than the law of England and Wales in terms of the legal rights and responsibilities of children and young people, particularly in regard to their competence to give evidence in criminal trials. The rules on children as

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[10] Criminal Law Amendment Act 1885

[11] Until recently, in England and Wales, this was 14 years. However the Sexual Offences Act 1993 lowered the age to 10 years.

[12] However, it is relatively rare for a child to be prosecuted for a crime in Scotland because s.31 of the Social Work (Scotland) Act 1968 forbids the prosecution of any child under 16 years without the Lord Advocate's permission, which is generally refused unless the offence is particularly serious. Most crimes and offences committed by children are dealt with by the Children's Hearing System, a legal structure for dealing with cases where children have offended or been offended against, which was brought into effect by the passing of the Social Work (Scotland) Act 1968.

[13] Although in practice this charge appears to be brought only when the girl is over 12 years and under 13 years.

witnesses cannot be seen in isolation from the general system of criminal procedure, and differences in the history of the Scottish legal system have produced a markedly different system of criminal procedure from that of England and Wales. Developments in Scots law since the 19th century, in particular, have contributed to what could be described as a 'liberal' Scots attitude towards the competency of children.[14]

Unlike the position in most other countries, where children below a certain age - usually 7 or 8 years - are not permitted to give evidence in criminal proceedings, in Scotland there is currently no such restrictions. Up until the 19th century, Scots law did, however, view the competency of the child witness somewhat more restrictively. Before then, it was a comparatively rare event for children to give evidence in criminal trials. This was primarily due to two prevailing rules. First, all witnesses in a criminal trial were bound to give evidence on oath, and, because all 'pupils' were forbidden to take oaths,[15] girls under 12 years and boys under 14 years were effectively disqualified. The second rule declared that children were incompetent as witnesses in proceedings for which their parents were involved.[16] There was yet another archaic and restrictive rule, however, which treated as incompetent the evidence from *any* female witness, young or old, in a Scots court of law.[17]

The modern Scottish rules on children's evidence are primarily based on common (or case) law, rather than on statutory legislation, as is the case in England and Wales. During the 1700's a series of cases took place[18] where the court decided to hear the unsworn evidence of young children (or 'pupils'), and, thereafter it became possible for children to give evidence in Scottish courts without taking the oath. In the mid 19th century, by means of the Evidence (Scotland) Act 1840, the rule disqualifying children from testifying against their parents was abolished. However, the Scottish courts never placed exaggerated value on evidence preceded by oath, and, by and large, Scottish courts over the years have taken a rather pragmatic view of the competency of the evidence of child witnesses, as the following quote by the institutional writer Dickson writing in the 18th century suggests :

> "... in criminal cases, where the facts are usually simple, and justice requires a full investigation , children, however young, may be examined on facts within their comprehension, although they may not be old enough to understand the nature of an oath. Under this rule, children of 4 and 5, 6, and 7 years of age have

14 See for example, Dent, H. & Flin, R. (1992) *Children as Witnesses*
15 Stair (1693) *Institutions of the Law of Scotland* (DM Walker ed.) b.4 tit.43 sect.7
16 ibid. b.4 tit.42
17 ibid. b.4 tit.43 sect 9
18 See Hume's *Commentaries* vol.2 (1844 edition)

> been admitted; and it is the daily practice to examine witnesses who are still in pupillarity."[19]

Currently in Scotland, *all persons* who are capable of making themselves intelligible to the court are competent as witnesses.[20] Those who have a sufficient understanding of the nature of an oath, are required to take the oath; and for those who do not have a sufficient understanding, the requirement of an oath is dispensed with. There is a competency requirement in that a child will not be accepted as a witness, even unsworn, unless he or she is able to demonstrate a sufficient *understanding* of the truth, and is able to give an intelligible account of what happened. Provided that the child demonstrates sufficient understanding of the truth to enable him or her to give evidence, then that evidence will be admitted. It is a matter for the presiding judge or sheriff whether the competency requirement is satisfied. He or she decides by a preliminary questioning of the child whether that child has the capacity to give an account of what happened, and a sufficient grasp of the truth to enable him or her to give evidence. There are no set or prescribed questions to determine a child's ability, rather it is a case of free judicial discretion as to the content and form of questioning that takes place. From court room observation of such cases in this study, it was found that such questioning was often very brief, consisting of just one or two questions. It was also evident that judges and sheriffs employed a variety of questions to ascertain whether a child was competent, ranging from the rather cursory "do you understand what is meant by speaking the truth?" and "do you know the difference between telling the truth and telling lies?" to the far more inventive (but possibly confusing for the child) method of constructing little scenarios to test whether the child recognises the difference between the truth and lying, such as "when you do something naughty at school, and the teacher asks you whether you did it and you say that you didn't, is that right or is that wrong ?" .

Some current Scots textbooks on evidence suggest that there is a (rebuttable) presumption against a young child being competent to give evidence[21] but the Scottish Law Commission in a Discussion Paper in 1988 stated:

> "... nowadays many judges tend to approach the question of competency from the other end ... [by assuming] that a child is *prima facie* a competent witness but may, upon a preliminary conversation with the child, reach the conclusion that the child is either incapable of giving intelligible evidence or is not yet able to understand the difference between right and wrong, and so is unable to tell the truth."[22]

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19 *Dickson on Evidence* (3rd edition) edited by PJ Hamilton Grierson 1887 p.852

20 This includes the mentally handicapped

21 See, for example, Walker, A.G. & Walker N.M. (1964) *The Law of Evidence in Scotland*

22 Scottish Law Commission *Discussion Paper* No 75 para. 2.3

The current practice in the Scottish courts is that children of both sexes over the age of 14 years take the oath, whilst children under 12 years give evidence unsworn. It is a matter for judicial discretion as to whether children between the ages of 12 and 14 years give evidence sworn or unsworn, depending on their level of understanding[23] which again is usually tested by means of preliminary questioning. There is no arbitrary age laid down by the courts below which a child is not permitted to give evidence, and children as young as two and three years old have testified in criminal trials.

Theoretically, once admitted, the evidence of a child ranks equally with that of an adult. There is no legal obligation on the presiding judge or sheriff to issue any special warning to the jury as to any supposed difficulty in accepting evidence from children[24] and it is therefore a matter for the jury to decide whether they believe the child's evidence or not. In general, the Scots rules on admitting evidence from children appear, on the whole, to have given rise to relatively little criticism or public debate.

It can be seen that the doctrine of non-competence underpins the position of children in relation to their legal capacity to take oaths and give evidence in court. Similarly, this doctrine lies behind young people's non-consent to sexual matters. Both stem from the common law wherein young people progressively gain legal competency in a wide range of matters, whether that is the capacity to enter into a contract, marry, retain property or consent to sex, as they grow older.

The Irrelevancy of Consent

The second basis on which consent is rendered invalid has arisen out of legislative intervention, which has been largely policy-related. Over the years, this has resulted in the creation of a number of statutory sexual offences. In the 19th century a whole new conception of the non-consent of young people was introduced and soldered on to the existing common law rationale of incapacity by means of a major piece of reforming legislation. Introduced at the end of the last century, the Criminal Law Amendment Act of 1885 heralded the beginning of a complex and intricate approach to the problematisation and criminalisation of sex between children and adults on the one hand, and to the issue of consent on the other. In effect the 1885 legislation raised the age of consent to sex for girls from 12 years (the age of puberty) to 16 years.

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23 Spencer, J.R & Flin, R. *The Evidence of Children : The Law and the Psychology* (1990)

24 Sheriff Kearney, *The Evidence of Children - The Scottish Dimension* (1989)

In the following section, I consider some of the social and institutional developments of the mid-late 19th century and, by so doing, trace the main concerns that contextualised the statutory intervention which effected the raising of the age of female consent and criminalised sex with post-pubertal girls. Neither the impetus for, nor the implementation of the 1885 Act was imposed by the state alone. Both the formulation and the deployment of the Act entailed a complex interaction between social, institutional and political ideological imperatives of the latter part of the 19th century.[25]

The 19th Century and Moral Crusading

The provisions of the 1885 Act which raised the age of consent stemmed directly from a number of social and moral concerns, articulated throughout the second half of the 19th century, which centred on the protection of (mainly working-class) young girls from the sexual advances of (mainly upper class) older men. Smart (1989) describes these concerns as constituting a moral panic about the threat to young girls, which could not only harm young girls but also threatened the contentment of family and social life.[26]

Although it has been argued that it is impossible to generalise over Victorian attitudes to sex over the period as a whole, and several writers have challenged the assumption of a unitary Victorian sexual culture and a single repressive standard of sexual behaviour,[27] in many ways, the Victorian era was characterised by intensive moral crusading around issues of sex and sexuality. Overtly, there was an emphasis on sin and decorum, and the exclusive promotion of reproductive adult marital sexuality rigidly confined within the private sphere of the family. Divorce was considered scandalous, prostitution involving young girls and juvenile masturbation by young boys demanded immediate eradication, and there was a rigid differentiation between male and female sexuality. The double standards of Victorian sexual politics have been well-documented, however, and it is not proposed to reiterate those arguments in any detail here. The 19th century constructs of sex and sexuality were articulated through a powerful moral discourse which in many ways has come to signify this historical period. Foucault (1981) argues that by the middle of the 19th century throughout Europe sexual matters had become characterised as much more than sporadic activities to be condemned or tolerated, but rather sex had become something which needed to be regulated or managed for the 'good of all'.[28] For this reason, Foucault distinguishes the Victorian

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[25] The 1885 Act also outlawed homosexual acts between consenting male adults, and sanctioned stricter surveillance and control of places where prostitution took place

[26] Smart, C. (1989) *Feminism and the Power of Law* p.52

[27] See for example, Hyam, R. (1992) *Empire and Sexuality : The British Experience*; Pearsall, R. (1969) *The Worm in the Bud*

[28] Foucault, M. (1981) *The History of Sexuality*

period from that of other historical periods that preceded it, as a time where sex and sexuality were made a focus of scientific concern, a time of the emergence of "a science of sexuality", which in turn precipitated an "obsessive preoccupation with and codification of sex".[29] A main feature of the Victorian sexual-scientific codification was its particular focus on that which was considered to be dangerous. The sexuality of children, and young girls in particular, was perceived as one such source posing physical and moral danger, and which required regulation and control.

Simultaneously, during the 19th century there was what Walkowitz (1982) termed a "new enthusiasm" for state intervention into the lives of the poor and "unrespectable" lower classes.[30] This intervention stemmed from social concerns, such as housing conditions, and was not directed solely at concerns of a sexual nature. During this period, groups bent on moral reform, raised concerns over the levels of extra-marital pregnancy, the dangers of juvenile masturbation, and the evils of prostitution and demanded legislative redress.

As a result of such campaigns, the mid-late 19th century was a time characterised by a proliferation of policy-directed legislation, and a number of statutes were passed which addressed what were perceived to be pressing social problems. By so doing, prevailing sexual and social ideology became embedded in subsequent laws and social policy. It was mainly in the latter half of the 19th century that a new concept and state of childhood was formally acknowledged in law. Moral reformers were particularly concerned with protecting the sanctity of childhood, and mounted a systematic campaign aimed at rooting out practices (predominantly associated with lower class areas and families) that were considered injurious (either potentially or directly) to children (and hence to the future population at large). The demands for increased legislative protection for children by the moral reformers of the time interlocked with their accusations of negligent parenting practices amongst the lower classes and the unrespectable poor.[31] The perspective of moral reformers and social purity groups that emerged throughout the 19th century was underpinned by a particular ideology which placed trust in the possibility of the reclaimability of those who had morally fallen. However, distinctions emerged between those who were deemed to be deserving and undeserving poor, and only the former group were viewed as potentially reclaimable. As far as the reformers were concerned, poor working class parents in particular regularly jeopardised and often violated the interests of their children in a multitude of ways. For example, this was considered to occur due to lack of (sexual) discretion between adults in

[29] ibid.
[30] Walkowitz, J. (1982) *Prostitution and Victorian Society* Introduction
[31] ibid. chapter two

cramped and overcrowded households, and their perceived lack of interest in preventing early sexual experimentation between young children, but also through the child's general association with adults who were considered to be 'bad' role models. There was a concern that not only did parental behaviour and social conditions combine to jeopardise childhood innocence, but also these same factors contributed to the premature emergence of nascent sexuality in children and young people. Middle class reformers found working class laxity at extreme odds with their own conceptions of sexual morality, and strongly and vociferously agitated for more repressive restrictions designed to safeguard childhood innocence, particularly in relation to young girls. Gorham (1978), for example argues with respect to those advocating moral reform that

> "[w]hereas their own daughters were ... both protected and controlled, in the eyes of the reformers poor girls of the same age experienced neither the benefits of protection nor the constrictions of control." [32]

However, the middle class vision of unsullied childhood was just not present in lower class families. Hence, the reformist quest was the construction and imposition of a particular construction of childhood (of which more later in this chapter). Few children actually measured up to the imposed standards of innocence and purity and were hence seen as requiring protection, which in turn, justified increasing social and legislative interventions.

This was also a time of the emergence of some public concern about intra-familial incest, although there was at first a reluctance to legally acknowledge the incestuous threat within the Victorian family.[33] This reluctance was in part due to the difficulties in policing the private sphere, although doubts were expressed about the potentially deleterious impact of widespread public discourses on such sensitive matters.[34] Debate in Britain concerning the extent to which allegations of inter-familial incest were true or false had been stimulated by the publication in 1857 of a study by a professor of forensic medicine at the University of Paris.[35] There followed a preoccupation with the temptations and practising of incest, and lower class families in rural areas and urban quarters in particular were suspected of

> "dubious proximity, a history of debauchery, anti-social primitiveness, or degenerescence - of practising incest." (Foucault 1981:p129)

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[32] Gorham, D (1978) 'A "maiden tribute of modern Babylon" re-examined : child prostitution and the idea of childhood in late Victorian England' *Victorian Studies* 21, 3, Spring, p374

[33] Evans, D. (1994) Falling Angels? - the material construction of children as sexual citizens' *The International Journal of Children's Rights* 2: 1-33

[34] O'Donovan, K. (1985) *Sexual Divisions in Law* p102-104

[35] Tardieu, Ambroise (who was also the Dean of the Medical School at the University of Paris)

Despite raised concerns there was some resistance to the introduction of legislation which specifically dealt with sexual abuse within the family, largely stemming from an insistence that such acts did not occur. Although the basic principle that young girls should be protected from sex was set by the 1885 Act, the legislative response to 'the problem of incest' did not occur until over two decades later in 1908.[36]

Nonetheless, the general protection of children and young people became ever increasingly the focus of state interventionism and public policy formulation. The policies underlying the protection of children - not just from the dangers of sexual abuse within the family but also from parental neglect and 'bad association' - had as a main objective the withdrawal of children from families that were suspected of practices that (physically, morally or psychologically) endangered children. For example, the Infant Felony Act 1840 established the right of the courts to remove children, if it was considered to be in their interest, from the custody of parents who had been found guilty of felonies; similarly, the Industrial Schools Amendment Act of 1880 enabled courts to remove children shown to be living with depraved or disorderly persons and to place them in industrial schools. A series of Poor Law statutes strengthened the courts' powers to monitor and curtail parental authority.[37]

The "Protean Problem" of Prostitution

Additionally there was increased official concern over what was described as the "protean problem of prostitution" which had visibly increased quite considerably during the 19th century, particularly in garrison towns and ports, and in cities such as London where it was estimated that there were more brothels than schools or charities.[38] Prostitution was seen to pose a particular threat as a form of dangerous sexuality undermining the social fabric and, sustained by a social ideology which held the 'common prostitute' to be the literal and figurative "conduit of infection to respectable society", prostitutes became a focus of social fears. The social problem of prostitution became an increasingly lively public issue which led eventually to the passing of a series of statutes, the Contagious Diseases Acts of 1864, 1866 and 1869[39] which were designed to control and contain prostitution.[40]

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[36] This came with the Punishment of Incest Act in 1908

[37] The Poor Law Amendment Act of 1889 vested parental rights in guardians where the child was deserted or offended against or where parent was in prison; the Poor Law Amendment At of 1899 allowed for testing of parental fitness.

[38] Hyam, R. (1992) *Empire and Sexuality : The British Experience* p.60

[39] The Contagious Diseases Act was first passed in 1864, and then modified in the subsequent statutes of 1866 and 1869. The ostensible aim of these Acts was to curtail the spread of venereal disease amongst enlisted men in garrison towns and ports largely in the south of England and Ireland. For a full discussion of these Acts, the public controversy that surrounded them, and the successful feminist campaign to repeal them, see Walkowitz, J. (1982) *Prostitution and Victorian Society*

[40] It is perhaps interesting to note that social purity groups were against this legislation, largely because the Acts did not *abolish* prostitution, but presumed its continuing existence.

The late 19th century was also a time of heightened moral concern over child prostitution. The sexual abuse and exploitation of children - in particular young girls - emerged almost as a side issue of the public campaign against prostitution. But it quickly gained prominence as a widespread problem and gained momentum as a public issue. The social purity campaigners focused on youthful sexuality as a form of dangerous sexuality to be controlled and repressed, and in a sense, this particular preoccupation almost eclipsed that with older women prostitutes. In 1835 the London Society for the Protection of Young Girls was founded out of a concern that young girls were being lured into brothels by unscrupulous procurers and brothel-keepers at a young and impressionable age. Towards the end of the century, a newly-formed purity group emerged, the National Vigilance Association (NVA) and joined the swelling ranks of social purity campaigners. Around this time a somewhat odd alliance was formed between several charities, journalists and politicians and this extremely vocal group began to agitate for the female age of consent to be raised, as a counter-measure against the rising numbers of girls and young women who were perceived to be entering prostitution, working on the street and in brothels. Underlying this was the aim of criminalising those men who 'took advantage' of girls who, due to their young age, were not "considered responsible for the disposal of their own person."[41] The National Society for the Prevention of Cruelty to Children (NSPCC) also began agitating for the age of consent to be raised.

Social purity campaigners also drew attention to the reputed 'white slave' trading of young girls from Britain into prostitution on the Continent. The uncovering of a traffic in young women from Britain to licensed brothels in Belgium was constructed into a sensational scandal of young innocents being lured into prostitution by false entrapment.[42] In 1881 the House of Lords Select Committee on the Protection of Women and Girls was set up to inquire into the state of the law relating to the protection of young girls from "artifices to induce them to lead a corrupt life".[43] Over the summer of 1881 the Committee, chaired by Earl Cairns, heard many accounts from lawyers, magistrates and police officers of young women who had been kidnapped or decoyed under false promises of marriage or 'respectable' employment to the Low Countries and then forced into working in brothels. Several witnesses gave accounts of female *placeurs* who sought "not common prostitutes but girls who

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[41] Parliamentary Debates Third Series 1884-1885 vol VII [297] 943

[42] Walkowitz's detailed research however debunks the conception of large numbers of sexually inexperienced women being lured under false pretences to overseas brothels. (1982) *Prostitution and Victorian Society*

[43] Report from the Select Committee of the House of Lords to inquire into the state of the law relating to the Protection of Young Girls from artifices to induce them to lead a corrupt life, and into the means of amending the same (1881) (448) IX. 335

were not leading immoral lives"[44] and lured them across to Europe with promises of employment as a nursery maid or governess. Not only did this constitute a moral outrage, but the Select Committee stated that it also constituted a "violation of parental authority" in that several of the young girls were of an age in which they were still under the authority of their parents. The publisher and vigilance campaigner Alfred Dyer was one of the witnesses who reported to the Select Committee on cases of young women who had been forced or tricked into prostitution in Belgium and France. His later publication of some of the written testimony of those he had spoken to and letters he had received from other young women in similar circumstances did much to fuel the campaign. Fears over 'white-slavery' melded well with those over child prostitution, and this 'new' scandal was appropriated by the reformers in their battle for legislative intervention for sexual offences and procurement.

The Select Committee were not only concerned about the 'white slave' trade. In the course of their deliberations they also explored the extent to which "juvenile prostitution" occurred in London, and one can detect an early indication in these discussions that they were considering a statutory intervention which would render consent irrelevant. It is also clear from their Report that their concern was not with the protection of young prostitutes who they considered 'beyond rescue' (unlike the purity campaigners who believed in reclaimability) and who displayed a "reckless and hardened condition of mind".[45] Rather it was with the protection of those 'young innocents' who "have not got significant prudence and knowledge of the world to defeat the purposes of designing men".[46] The concern was therefore with the innocent rather than the fallen. This distinction between those girls who were rescuable and, perhaps more importantly, were *deserving* of rescue and those which were not, is a very significant dichotomisation, and is something which will be picked up in later chapters.

Another major concern of the Select Committee was the extent to which child prostitution in London took place with the consent of parents (as opposed to the situation alluded to earlier where violation of parental authority was thought to be an issue). The Select Committee heard evidence that

> "prostitution takes place with the knowledge and connivance of the mother and to the profit of the household ..... mothers facilitate the debauchery of the children"[47]

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[44] Report from the Select Committee of the House of Lords (1881) IX. p.368
[45] ibid. p.365
[46] ibid. p.388
[47] ibid. p.423.

It was contended that mothers 'sold off' their daughters to procurers who put them to work 'on the street'. The implication of course is that, rather than protecting their daughters, such mothers were actively contributing to their downfall. Allusions to "a bad home influence" were frequently made. In the same interventionist vein as earlier reformers, the Select Committee in their concern that mothers were consenting to their daughters defilement appeared to incorporate as an objective the prevention of parental practices which endangered young girls in this way.

The issue of prostitutes being 'on the street' and, unlike their European counterparts, not in brothels, was also a major consideration. One witness to the Select Committee had testified that on one summer night at 12.30 am there were over 500 young girls prostituting themselves between Piccadilly Circus and the bottom of Waterloo Place.[48] The concern was with the potential that this visibility had for leading other young girls into temptation, again echoing the desire to protect the innocent from the debaucheries of the fallen. Whilst there were undoubtedly young girl prostitutes on the streets in cities such as London and Liverpool, Walkowitz (1982) has argued that their numbers were grossly exaggerated, mainly through the propagandist efforts of the purity campaigners.[49]

Raising the age of consent was also a consideration in the discussions about the visibility of "the shifting population" of girls on the street. The question of consent was posed as a means by which juvenile prostitution, a dangerous (and visible) form of sexuality (and one which was in the forefront of the public mind given the furore around the earlier Contagious Diseases Acts) could be criminalised. It was thought that criminalisation would act as a deterrent (not it seems for young girls to enter prostitution) but for the procurers and the men who paid for their services and also for those parents who consented to their daughters becoming prostitutes. The raising of the age of consent was a route to criminalisation of sex between girl prostitutes and older men. Because many of the (most visible) young prostitutes were in their early teens they had reached the age in which, under the existing common law, they could consent to sex (that is, they were above the age of puberty). For that reason it was recognised by the legislators that the sexual intercourse involved "did not amount to rape."[50] By rendering that consent irrelevant, however, sex with young women could be effectively outlawed. After hearing the evidence put before them by all witnesses, the Select Committee stated that "the evidence given established a conclusive case of the necessity of raising the age of consent."[51] The Select Committee also took evidence from witnesses concerning the question

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[48] ibid. p.433

[49] Bristow, E.J. (1977) *Vice and Vigilance : Purity Movements In Britain Since 1700*

[50] *Hansard* Parliamentary Debates Third Series 1884-1885 vol. VIII [300] 687

[51] Debate on Bill in Committee 1883 (*Hansard* Parliamentary Paper [286] 1391

which age was appropriate. It was their eventual view that the age of consent should be 16 years. It is interesting to note however that at one stage that Select Committee considered extending protection to girls up to the age of 18 years "as the period between 16 and 18 years is one of especial temptation". It is not entirely clear whether it is the girls or the older men who were especially tempted.

The Report of the Select Committee was taken up with much enthusiasm by the purity reformers. Quite suddenly, their age-of-consent campaign received a massive boost and much favourable publicity from a rather salacious journalistic expose written by W.T. Stead, a London journalist of the time. In July 1885, the Pall Mall Gazette published in serial form 'The Maiden Tribute of Modern Babylon' which was Stead's detailed account of how he had posed as a debauche and bought a 13 year old girl (with a certificate of virginity) from a London abortionist. Although he had not "used the girl for the purposes for which she was purchased", he was arrested, prosecuted and jailed for procurement.[52] Stead's rather melodramatic expose conjured a scenario of predatory, male aristocrats buying innocent young virgins from disreputable procurers, who had lured them into prostitution under false pretences. Stead described the transactions as common place and easy to effect.[53] The publication of the series and Stead's subsequent imprisonment electrified public opinion and provoked hysterical consternation about the plight of young girls. Across London, there were public demonstrations to denounce criminal vice and to demand the passing of legislation which would criminalise sex between adult men and young girls and which would raise the age of consent for girls to 16 years.[54]

Such extensive middle class agitation, which involved feminist campaigners and purity groups joining forces with religious, charitable and welfarist groups, resulted in (youthful) female sexuality being put firmly onto the public policy and legal agenda. What is interesting here is the way in which the 'revelations' of the period - the proliferation of child prostitutes, the emergence of concerns about incest and the white slave scandals - which were 'uncovered' by the reformers were formulated as distinct rationales for the introduction of specific legislation.[55] The introduction of legislation was presented as the obvious and logical solution to these social problems. Indeed it was declared that "The whole subject is thoroughly ripe for legislation." [56]

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[52] Bristow, E.J. op. cit.
[53] Gorham op. cit..
[54] It was estimated that in Hyde Park, a massive crowd of 250,000 gathered, see Bristow, E.J. (1977)
[55] The Incest Act was finally put into place in 1908 in England/Wales, although there were several unsuccessful attempts to pass the Bill criminalising incest from the last years of the 19th century
[56] *Hansard* Parliamentary Debates Third Series 1884-1885 vol. VII [299] 198

Having decided on a legislative solution, there was, throughout the 1880's, considerable debate concerning what form such legislation should properly take. Legislation which raised the age of consent was the popular choice of the people and this was recognised within Parliament, although a small minority of MPs thought that some form of extension of the Contagious Diseases Act would stem the tide of young prostitutes. There was much debate concerning the most appropriate age for consent, and 15 years, 16 years and even 18 years were put forward at various times. There were several attempts to pass the Criminal Law Amendment Bill and each time it floundered mainly over the issue of age, and what were considered to be the *implications* of setting, for example, 15 years over 16 years. For example, in relation to the question of age, Lord Mount Temple maintained that 15 years was "far too low an age for girls to exercise independent responsibility " and thus too low an age "at which the consent of girls should be considered a justification for their seducers."[57] It was his view that the age of consent should be set at 16 years. This was a view shared by Lord Norton who put forward a set of principled reasons why the age of consent should be brought in line with other areas of law relating to children. He cited the fact that the Court of Divorce adopted a 16 year limit as it dealt with custody of children up to the age of 16 years; the Court of Chancery retained special guardianship up to 16 years; Boards of Guardians were legally responsible for children up to 16 years and,

> " ... therefore according to general principles of our law the discretion of a girl under 16 years should not be thought sufficient to permit her the unprotected disposal of herself."[58]

Underpinning this view is a concern that young girls were vulnerable and requiring of protection but also were unable to exercise any independent responsibility or discretion for themselves.

> "Many of the poor children were in such a state of misery that it would be scarcely possible to protect them efficiently. But there were others not in that state, yet who were in danger of being made the victims of vice, and were incapable of protecting themselves; and these girls, at all events, ought to be protected by law. The law ought to step in in such cases and make it dangerous for anybody to take advantage of their youth and inexperience for wicked purposes, and so to condemn them to a life of absolute misery."[59]

Most of those that held the view that girls were incapable of protecting themselves also maintained that girls under 16 were incapable of knowing the meaning or the consequence of

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[57] ibid. vol. V [297] 943
[58] ibid. vol. V [297] 942
[59] ibid. vol. V [299] 208

sex, "at 16 a girl is manifestly a child, a person of tender years" [60] This appears a welfarist inflection of competency as it harkens to the incompetency argument which underlies the common law rationale of non-consent, and hence signals a coming together of the two rationales. However, it was also in the debates about age that the issue of agency on the part of young girls was discussed. Several members averred that young girls were not as innocent as painted

> "Consent might be given by a girl of tender years for several motives. In the first place, it might be given because presents were offered to her ..... [or] because the girl did not actually know what would happen ..... But consent might be due also to natural causes"[61]

'Natural causes' were later elucidated as "sensual passion" on the part of the young girl. This was not thought to be a common occurrence however. Furthermore, it was also contended that if a girl had "sexual knowledge and passion" then it "was the result of unusual precocity" on her behalf.[62] This equation of sexual passion and precocity was however, later to have far reaching implications.

The most vocal objection to the raising of the age of consent were couched in terms of the implications that it may have in terms of "opening the doors to extortion by young girls and procurers of innocent men."[63] It was thought that men might be induced to yield to the temptations of young girls "who might use the powers of this Bill for purposes of obtaining money" Clearly there was a concern that, following intercourse, men would be the victims of blackmail or extortion by underage girls threatening to report them to the police for committing an offence under the statutory provisions. There was a perception that young prostitutes would try to trap men in this way. This of course added another dimension to what was seen to be the increasingly complex relationship between premature sexuality and other forms of immorality. Furthermore, those that held the view that young prostitutes would use legislation to blackmail men also vociferously raised doubts about the presumed 'innocence' of young girls, preferring instead to see them as fallen and beyond rescue. In formulating the legislation, some MPs wanted to insert a clause which stipulated that the provisions would apply only to those girls who were not " a common prostitute or person of known immoral character." [64] and so formally distinguish between those girls who were deserving of the law's protection and those who were not.

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[60] ibid. vol. VIII [300] 773
[61] ibid. vol. VIII [300] 716
[62] ibid. vol. VIII [300] 718
[63] ibid. vol. VII [299] 204
[64] *Hansard* Parliamentary Debates Third Series 1884-1885 vol. VIII [300] 705

Despite the misgivings voiced by some of the MPs in the Parliamentary Debates at this time, during the latter half of the 19th century the protection of young girls from sexual exploitation and coercion became a major social concern, and was one of the fundamental underlying principles of the statutory formulations. At this time, there were also powerful scientific and moralistic arguments around concerning dangerous sexualities which, together with the public sentiment echoing throughout the campaigns, profoundly affected the way in which the issues became legally defined and statutory law emerged.

Public campaigning for social purity and moral reform played an important role in the eventual formulation of the 1885 Act, in that it attained royal assent as the culmination of a lengthy, and at times quite vociferous series of public and parliamentary debates focusing on a perceived need to protect young and vulnerable (primarily working class) girls from the dangers of premature sex and exploitation at the hands of ruthless adult exploiters.[65] By raising the female age of consent, the ensuing 1885 legislation appeared to respond to the demands of reality.

The 1885 Criminal Law Amendment Act

The 1885 Act effectively extended the existing common law prohibition on heterosexual relations with girls beyond the age of puberty (12 years) to make it a statutory offence to have sex with a girl under the age of 16 years. The female 'age of consent' was thus effectively raised to 16 years.[66]

The 1885 statutory provisions essentially created a series of sexual offences of 'unlawful sexual intercourse'(sometimes referred to as statutory rape) and 'unlawful sexual behaviour' (that is, sexual behaviour which falls short of penetrative intercourse) defined in terms of the age of the victim. It also put into place a number of provisions concerning the procurement of young girls for prostitution and the suppression of brothels. Most of the provisions of 1885 concerning 'unlawful' sex with girls under 16 years are now encoded (in a very similar form) in the current Sexual Offences (Scotland) Act 1976 (see Chapter Two for details of these offences). The 1885 Act is thus the foundation of the contemporary statutory provisions regulating sex between adults and young women. The basis of the age-defined 'unlawful sexual offences' of today remains largely unchanged from the 19th century and, currently, whilst the law does not suggest that a girl over the age of 12 years is *incapable* of consenting to sex, it is maintained that her consent remains legally *irrelevant* until she reaches 16 years.

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65 House of Lords Select Committee on the Protection of Young Girls (1881-1882) British Parliamentary Papers , Vol. 5

66 There is no age-of-consent statutory legislation covering male heterosexual involvement

Essentially this means that whilst the law recognises her consent 'in fact', it is not considered to be relevant.

In practice, then, one needs to take into account both the older common law and the statutory 'ages of consent ' to understand, on the one hand, current practice in terms of how child sex is charged under Scots law but also, on the other hand, to understand how the issues of consent and non-consent are posed. Sexual intercourse with a girl under 12 years is automatically charged as rape, simply because she does not have the capacity to consent (common law basis). A girl over that age has the *capacity* to consent, but this is seen as *irrelevant* until she reaches 16 years (statutory basis). Sexual intercourse with a girl over that age but under 16 years who consents 'in fact' will prevent the crime of rape (which is dependent on a lack of consent), but not the statutory offence of 'unlawful sexual intercourse'. In such a case, the girl's consent does not fully exculpate an accused, but rather it serves to distinguish the crime of rape from the statutory offence of 'unlawful sexual intercourse'. Where the sexual intercourse takes place without the consent of the girl, then the charge would, of course, be one of rape. Technically then consent and non-consent should not be at issue in a criminal trial for a statutory sexual offence where the complainer is a female under the age of 16 years. The fact that consent does assume a position of importance and significance in such trials will be discussed in detail in later chapters.

Protectionism and the Gender Differential

Several writers, in an examination of the specific laws relating to sexual behaviour, have pointed to the ways in which such laws embody a manifestly paternalistic concept of female sexuality.[67] In many ways the 1885 Act exemplifies such an approach, as it was informed by a particular doctrine of childhood and adolescent sexuality, with a very marked sex differential, which was not entirely incidental. It reflected certain social attitudes and opinions and perspectives about female sexuality, and in particular the vulnerability of young girls, as opposed to young boys, to sexual exploitation. Historically, girls have been - and indeed continue to be - treated quite differently from boys in terms of laws prohibiting sex. There is a marked and inherent differential in the 'protection' offered by the law according to the sex of the young person. Although girls achieve puberty two years earlier than boys, the absolute prohibition on sex with girls was extended under the legislation until they reach 16 years. For boys, the common law prohibition does not extend beyond puberty, that is 14 years. It is, however, important to note that this applies only in relation to heterosexual sex,

[67] See, for example, Edwards, S (1981); *Female Sexuality And The Law* ; Smart, C. (1981) 'Law And The Control Of Women's Sexuality' in Hutter, B & Williams, G. (eds.) (1981) *Controlling Women*

as until recently, homosexual relations between males were prohibited unless both were over 21 years.[68]

Thus the raising of the age of consent applied only to girls, who were (and still are) seen to need protection, either because of ignorance or vulnerability or foolishness.[69] Genital sexual intercourse in particular is a sexual activity which has long been considered harmful for girls, and this is so for a number of distinct reasons. Sex at an early age was (and still is) regarded as potentially harmful for young girls, not least because of their potential fertility. Girls were seen as more in need of the protection of the law, they were perceived as more vulnerable[70] and, because of their potential fertility, more in need of protection from the plight of early pregnancy. The 1885 Act, in many ways, epitomised the morality of the age in which it was passed, in that it assimilated the prevailing ideas and presumption about the sexuality and relatedly the sexual vulnerability of young girls into statutory law, and as such moved beyond mere protectionism.

By raising the age of consent to 16 years, the Act created a potentially anomalous situation with regard to the age of consent and the age of lawful marriage for females. It was stated earlier that under the older common law, girls gained the competency to consent to sex at 12 years old. This was also the age of lawful marriage. The criminalisation of sexual behaviour with girls under 16 years of course had implications for those situations where the girl was legally married. To remedy this anomaly, the word 'unlawful' was added to the statute to differentiate between 'lawful' sex (that is, within marriage) and 'unlawful' sex (that is, extramarital sex), and thus created an exception of sex within marriage where the girl was under 16 years.[71] It was not until 1929 that the age of puberty and the age of lawful marriage for girls were finally disentangled, when the Marriage (Scotland) Act 1929 raised the age of lawful marriage to 16 years.

This differentiation between what counted as 'lawful' and 'unlawful' sex adds more fuel to the argument concerning the legislator's preoccupation with that type of sex which was socially disapproved. The focus on 'illicit and dangerous sex' reflected deeper concerns about appropriate sexual behaviour of young girls. Sex within *marriage*, even if the girl was under 16 years was entirely acceptable. Outside marriage it was dangerous and unacceptable

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[68] So it could be said that the idea of protection applied there also, and it would be reasonable to assume that the law's intention was to protect those under this age from those above this age.

[69] O'Donovan, K. (1985) *Sexual Divisions in Law* p.104

[70] Policy Advisory Committee on Sexual Offences *The Age Of Consent In Relation To Sexual Offences* Cmnd 8216 (1981) paras 11ff

[71] Today, if a girl below the age of 16 years is validly married under a foreign legal system, then it is not 'unlawful' for her husband to have sex with her in Scotland

and therefore criminalised. It was not so much that young girls had to be protected from sex, it was sex of the wrong kind - or rather - sex within the wrong type of relationship, that is extra-marital sex for money with older men .

Youthful Sexuality and the Contradictory Discourses of Vulnerability and Threat

Although the raising of the age of consent was designed to deter men from having sex with young girls, one of the effects of the legislation was to increase the number of young (mainly working class) girls who became subjected to forms of moral vigilance, which could in turn lead to their removal from home and placement in reformatories or industrial schools.[72] As Smart (1989) points out the protectionism afforded by the Act had its disadvantages.[73] Not only did this form of protectionism result in closer surveillance of young girls which could lead to their own incarceration, but as Smart (1989) emphasises this surveillance gave rise to invidious effects in terms of the way that the sexually violated girl came to pose a particular problem. Smart identifies the approach embodied in the 1885 Act as one which combines a recognition that children need to be protected from sex with an ambivalence towards those children who are the victims of sexual assault.[74] She characterises the approach as one which elevated the ideals of purity and innocence in childhood, yet viewed the 'defiled and knowing' child as an anathema and embarrassment.[75] A dichotomy is set up between those who are innocent and those who are not. Those who are not innocent are seen as morally damaged, without the protection of innocence, and therefore forfeit the protection afforded by the law. Smart (1989) maintains that bound up with the very motivation to protect incorporated by the 1885 Act, are doubts that *all* young girls deserve this protection.[76] One of the consequences of the 1885 Act then was that it resonated with prevailing socio-cultural forces to create and sustain the 'problem' of the sexual child. So what we seem to find embodied within the legislation are in fact two forms of protectionism in relation to young girls - one form of protectionism which aims to protect the asexual, innocent child from the perversity of the sexual; and the other which has as its aim the protection of the innocent from contamination by the problematised 'sexual child'. The focus would come to be on distinguishing *between* young girls.

This dualism can also be traced through the discourse of childhood sexuality that dominated in the 19th century. The moral crusades constructed young women and girls largely as the victims of the unrestrained lusts of debauched men. Young female sexuality when it featured

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[72] Walkowitz, op. cit. chapter two
[73] Smart, op. cit. p.51
[74] ibid. p.51
[75] ibid. p.51-52
[76] ibid. p.53

in these considerations was usually cast as passive rather than active, yet even in this dormant state was apparently seen as a perpetual source of temptation to men. Much has been written about western discourses on the sexuality of children, which are characterised by what appear to be inherently contradictory statements.[77] Within these discourses, children are presented as simultaneously sexual and asexual, simultaneously innocent and provocative, simultaneously sexually vulnerable and sexually threatening. The twin - yet contradictory - issues of the dangerous sexualities of children and the notion of purity and innocence of young girls were rather swiftly taken up into the legal process following the revelations by Stead. That children are simultaneously asexual and sexually latent, innocent but at the same time violable is formally acknowledged in the 1885 legal statutes.

As previously stated, the 1885 legislation was informed largely by a social and moral climate that idealised the image of children, and particularly young girls, as naturally innocent, pure, unsullied, untarnished, passive, and most importantly, asexual. Children were not supposed to be sexual at all. They were supposed to be sexually passive and without sexual desires. This was a view founded on a stereotype of a specific construction of sexuality - one based on a popular narrative of asexual innocence and chastity and virtuousness. Innocence - especially sexual innocence - was celebrated and equated with virtuousness. Children were seen to be vulnerable, innocent of the sin of the world, and therefore required to be protected and shielded from the realities of sex until they were more of a suitable age. Innocence was - and still is - a powerful and emotive symbol which provoked public revulsion and concern about the prostitution of young girls. The 1885 legislation also recognised (adult) male sexuality as the main threat to the innocence and purity of children, and there was a stress on the particular sexual vulnerability of young girls as opposed to young boys. It is evident from the Parliamentary debates, that 19th century sentiment posited a strong relationship between the doctrine of protectionism and the image of the innocent female child. The intention behind the legislation was stated as a

> "desire to see crime of whatever character adequately punished, and the innocence of childhood carefully and rigidly protected."[78]

Yet at the same time, there were strong contradictions inherent within this somewhat sentimental Victorian view of the innocent, asexual child. There were references made in the Parliamentary discussions to the 'dangerous' sexual potential of young girls, as referred to

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[77] See, for example, Jackson, S. (1982) *Childhood and Sexuality* ; Bell (1993) *Interrogating Incest: Feminism, Foucault and the Law*

[78] *Hansard* Parliamentary Debates Third Series 1884-1885 vol. VII [299] 204

above. A close reading of the 1885 Act and the debates and commentaries[79] that led up to its passing also suggest an interpretation of the reasoning behind the raising of the age of consent. It seems clear from the legal commentaries, and also from the wider social and ideological preoccupations of the time, that the legislators did in fact consider post-pubertal girls to be potentially sexually self-determining (at least more so than girls under 12 years). Some legal commentaries on childhood and sexuality not only averred that the two should be formally separated until such time as sexual maturity be assumed to have occurred (i.e. after reaching the age of 16 years) but they also implied that this separation was somehow unnatural and contradictory - young girls being regarded as capable of sexual behaviour. Indeed the evidence of this as it occurred in relation to child prostitution had sparked the public debate in the first place. According to this parallel view, exposure to sex was dangerous in that it could arouse the demonic child that lay quiescent within and unleash the sinful urges that lay just beneath the surface. Linked to this was the view that a premature sexual event would automatically bestow sexual knowledge and endow the child with sexual experience, which in turn would create the possibility for further sexual exploitation. The resultant picture is of the child - and in particular the young girl - as a mixture of asexual passivity and riotous promiscuity. As stated by Jackson (1982) in the 19th century there was a perceived need to protect the child from others at the same time a need to protect others from children.

In some ways the contradictory picture of the innocent yet potentially sexual child is not unlike some stereotypical depictions of adult female sexuality, which embody a somewhat similar dichotomy of women as Madonna/Whore. One of the prevailing notions in the 19th century was a wide cultivation of the view that women and children are incapable of sexual response, yet simultaneously constituting a sexual threat and danger. William Acton, for example, viewed women to be, on the one hand 'not much troubled' by sexual feeling, yet on the other to be filled with insatiable sexual desires. Anne Dickson (1985) describes these contradictory ideas - between Woman as Evil and Woman as Chaste - thus :

> "One the one hand, sex was envisaged as the devil's dynamite, a constant powers in man's genitals, ready to be kindled in an instant by the tempting wiles of a woman. Or, on the other hand, the devil (and sexuality) was believed to reside in a woman's flesh: women's bodies were vehicles of evil, carriers of an evil force. Either way, women had to be avoided at all costs."

Similarly, some contemporary feminist literature on child sexual abuse has also highlighted the ways in which children, especially young girls, are understood only by reference to this

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[79] For example, those legal commentaries which are to be found in *The Scottish Law Reporter* 1884- 1886, and *The Journal of Jurisprudence* 1885, Edinburgh, T & T Clark

wicked/innocent dichotomy, where childhood is idealised as a time of innocence and the sexual child is seen as contaminated. As Kitzinger (1988) points out innocence is a problematic concept because it is itself a sexual commodity.[80] To pick up on Smart's (1989) point about the 1885 Act combining a recognition that children need to be protected from sex with an ambivalence towards those who are the victims of sexual assault, the romanticism of childhood innocence has the effect of excluding those who do not conform to the ideal of innocence. The sexually 'knowing' child may not only forfeit her claim to protection but, also, she may be stigmatised due to her loss of innocence. The sexually experienced girl is transformed into the problem which needs regulation.

On the one hand then there are the two rationales of non-consent which inform legal thinking about sex with young people. These rationales offer a set of distinct yet related reasons for the prohibition of sex and also set the parameters within which sex with young women becomes legally acceptable. Consent to sex by young women is technically invalid until the 'age of consent' is reached. Thereafter, to recall the 19th century phrase a young women becomes 'mistress of her own person.' The two rationales also underpin the definition of all of the sexual crimes and offences that relate to young people, and thus resound in the trial situation where the definition of the crime is crucial, not only as a means of (legally) categorising what took place, but also because each component of the crime or offence must be addressed by evidence.

These rationales rest rather uneasily together, stemming as they do from quite different concerns regarding young people and sex. The twin yet contradictory discourses of vulnerable and threatening young female sexuality which to a large extent inform the second rationale, that of irrelevant consent, are reflected in the statutory formulations that resulted from the introduction of a 'new' basis of non-consent. As a result some tensions are set up, occurring particularly around the (what appears to be a deliberately divisive) notion of deserving and undeserving complainers (which do not seem to have a parallel under the older common law prohibition). Despite the welfarist principles which, purportedly, guided the 'age of consent' legislation, one ultimate effect is the faciliation of a standard of differentiation, based on sexuality, by which some girls' are deemed worthy of the law's protection and others are not. The way in which these welfarist principles get transformed by law into legal mode in the court room, and the resultant focus on sexuality in the trial situation is pursued in this thesis.

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[80] Kitzinger, J. (1988) 'Defending Innocence: Ideologies of Innocence' Special Issue *Feminist Review* 28 Spring

CHAPTER TWO

THE SEXUAL CRIMES AND OFFENCES

This short (somewhat legalistic) chapter identifies the relevant sexual crimes and offences which will be referred to throughout the following chapters, and notes some characteristics of the law in this area.

Scots law governing 'sexual' crimes and offences is a blend of common law and statutory provisions. The range of present laws are primarily the result of judicial decisions made in the High Court and statutory amendments to the common law which have taken place over the last 100 years. In general, legislative interventions were prompted by changes in attitudes to sexual matters, and additions and modifications to the law in this area have taken place in a largely piecemeal way over the years. With some notable exceptions[1] the resultant body of law has evolved in a diverse and somewhat unsystematic manner, leading not only to a very wide spectrum of 'sexual' crimes and offences, but also to a fair degree of overlap between common law and statutory law. Whilst there are some key differences between Scots and English law both at the level of common law and statute, and in terms of legal principle and court practices, there are some sexual offences which share some similarities. This thesis concerns the Scottish law and court practice, and so particular attention is paid to Scottish characteristics. Notable differences between Scots and English law will be indicated where appropriate.

Currently, Scots law recognises a range of crimes and offences which could be classified as 'sexual'; ranging from rape, sodomy and incest, to 'purveying' pornography, soliciting for prostitution, exhibiting obscene works, and making indecent telephone calls.[2] These offences take place in different contexts, incorporate an extensive variety of situations and entail different forms of behaviour. The 'sexual' element may differ markedly in each; not all involve actual sexual activity; some involve the exercise of power; some involve sexual exploitation; some involve the degradation and humiliation of the victim; still others involve what is termed the 'corruption of public morals'. The range of 'sexual' crimes and offences differ not only in the form of behaviour which constitutes the offence, and the circumstances in which it may occur, but also, crucially, in the legal consequences for the perpetrator.

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[1] For example, the Incest and Related Offences (Scotland) Act 1986

[2] See Gane. C, (1992) *Sexual Offences* for a full and comprehensive account of the law concerning sexual offences in Scotland.

Although the following point was made by the Howard League for Penal Reform in relation to the law in England and Wales, it applies equally to that of Scotland:

> [the] law makes no formal distinction between 'sexual' offences and other offences. How one differentiates is therefore largely a matter of individual choice, and the criteria for classification are open to debate.[3]

Many different sorts of acts are seen as criminal, but there are no real formal distinctions between different categories of offences so, for example, making an indecent telephone call is, in some sense, just as much a criminal offence as rape. The differences are the level of procedure under which crimes and offences are prosecuted, the level of court at which crimes and offences are tried, and the maximum penalties that can be imposed.

The Importance of Sex

The gender-specificity of certain sexual offences is an important means of classifying types of sexual offences. In general, sexual crimes and offences prove the exception to the rule that the criminal law is predominantly gender-neutral and does not usually have any regard to the sex of either the victim or the perpetrator. Although in some sexual crimes and offences the sex of either party does not form part of the definition of the crime, either explicitly or implicitly, in other instances, the sex of one, or both, parties is crucial. In this sense, many offences exhibit a sex-specific bias. In some cases, it is the sex of the victim that is important, for example, rape necessarily entails a male perpetrator and a female victim, given that rape is defined as penile penetration of the vagina and, as such, is a gender-specific offence.[4] Some sections of the Sexual Offences (Scotland) Act 1976 can only be committed on women or girls, whilst others can be committed by either males or females. There are other offences where the sex of both parties is crucial in that the offence may only be committed by one sex with, or against someone of the same, or opposite, sex. For example, the incest-related offences specifically entail sexual intercourse and therefore can only be committed between a male and female. Indecent assault and indecent behaviour, however, can be committed by a male upon a female or another male, or by a female upon a male or another female.

Consent in Sexual Offences

Consent is another major factor in the classification of types of sexual offences. Offences can be divided into those activities which are illegal because one of the parties involved does not

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[3] Howard League for Penal Reform (1985) *'Unlawful Sex' Report of a Howard League Working Party* London p7.

[4] Although women can be charged with 'art and part' in rape

consent, and those where the parties do consent. The latter category includes those offences involving certain kinds of sexual activity between men and women, and between men. In the former category of offences, which primarily consists of those offences which involve sexual violence perpetrated by men against women, such as rape and indecent assault, consent is often a crucial issue in the trial.

Most of the sexual crimes and offences which are introduced in this chapter (and which form the basis for discussion throughout the following chapters) are those which typically involve young female complainers,[5] and to which the Scottish 'shield' legislation applies. As outlined in the Introduction, the 'shield" legislation has a very wide remit in terms of the sexual offences to which it applies. Some of these offences, for example, unlawful sexual intercourse are age-specific and relate only to young victims. Others - like rape - are not, but apply to both adults and children. In addition to those sexual offences covered by the legislation, the incest-related offences are also included here for the reasons given in the Introduction. To reiterate what was stated in the Introduction, even though incest offences are not covered by the legislation,[6] a) they commonly involve young complainers; b) there are possible similarities to other sexual offences in the type of evidence that is introduced in the trial, and; c) they are frequently used in the indictment as alternatives to other sexual offences - in particular rape and statutory age-related offences - which <u>are</u> covered by the legislation.

Because many of the crimes and offences discussed here apply equally where the complainer is an adult, and are not exclusively used where the complainer is a young person or child, they will be grouped here according to whether they apply equally to adult and young complainers, and whether they are specifically used where young complainers are concerned.

Non-Age Specific Sexual Crimes and Offences

1. *Common Law*

Most of these sexual offences are older common law offences, the definitions of which have been built up through case law.

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5 Some of the offences detailed here are gender-neutral in that they apply equally where males and females are involved

6 The Government is considering bringing forward proposals to extend the provisions to cover incest and clandestine injury. See the The Scottish Home and Health Department White Paper *Firm and Fair: Improving the Delivery of Justice in Scotland* 1993 p 70

1.1 *Rape*

As stated earlier, rape is generally considered the paradigm instance of sexual crime. It is regarded as the most serious sexual crime and consequently carries a maximum sentence of life imprisonment. The crime of rape can be committed upon any female, regardless of her age. It is an exclusively heterosexual crime involving penile penetration of the vagina to however slight a degree and not necessarily involving the emission of semen.[7] Forcible penetration of the vagina by a part of the body other than the penis, or by some object, does not constitute rape, but instead is classified as indecent assault, which has a lower maximum penalty. Similarly, anal or oral sex is not rape, but is usually charged as indecent assault.[8]

From the 1700's Scots legal texts described rape as "the knowledge of a woman's person ... against her will and by force"[9] although in some cases the requirement of force could be modified to include threats or drugging.[10] Evidence of force was necessary to prove that rape had occurred, hence "the resistance must ... be continued to the last; so that it is by main force only and terror that the violation is accomplished."[11] Up until the 19th century, rape was generally described as a violent act committed against a resisting woman, and a key test in the court room was the way that the woman resisted her attacker.

Modern Scots law governing rape is based on the decisions made in two 19th century cases. In *Fraser*[12] the accused had intercourse with a woman by pretending he was her husband, and was charged with rape and with "carnal knowledge of a married woman by pretending to be her husband". The court agreed that a crime had been committed, but the court rejected that it was rape because the woman had consented, albeit her consent was obtained fraudulently. It was said in *Fraser* that the essence of rape was that intercourse was obtained "without a woman's consent", but, according to Gordon (1978) the decision in *Fraser* can also be explained by reference to the absence of the use of any force by the accused.[13]

A second 19th century case attempted to move away from the requirement of force and the emphasis on the presence of a will to be overcome to an emphasis on the absence of consent. In *Charles Sweenie*, the accused had sexual intercourse with a sleeping woman and was

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7 This is an important difference between Scots and English law. Recent legislation in England has extended the crime of rape to include 'male rape' and penetration by objects other than a man's penis,

8 *Barbour v HMA* 1982 SCCR 195

9 Hume I 303

10 Gane, (1992)

11 Hume I 302

12 *HMA v William Fraser* [1847] Ark. 280

13 Gordon, GH, (1978) *The Criminal Law of Scotland* p885

charged with rape and of having "carnal knowledge of a woman when asleep, and without her consent."[14] The court held that he had not committed rape, and ruled that, in the case of a sleeping woman, she cannot express her will and, although she does not consent, there is no rape because intercourse is not achieved 'against her will'. Nonetheless, the court decided that it was a criminal offence to have intercourse with a non-consenting woman even though (because she is sleeping) it cannot be said that intercourse took place 'against her will'. Thus, if a man has intercourse with a sleeping woman when she is unaware of his presence or his intentions, then she has shown no unwillingness, no force has been used to overcome unwillingness, no rape has been committed.[15] The court in *Sweenie* reiterated that force was an essential part of rape and defined force as "any mode of overpowering the will without actual physical violence, such as the use of threats or drugs."[16]

The ruling in a 20th century trial,[17] where two men were charged with having 'carnal knowledge' of a woman whilst she was unconscious from the effects of alcohol, was somewhat analogous to that in *Charles Sweenie* in that the court held that what the two men had done was not rape, although it was a criminal offence which the judge termed 'clandestine injury'. Here, again, the same logic applied in that the offence was not considered to be rape because it did not take place 'against her will'. However, where drinks or drugs are deliberately administered to a woman in order to have intercourse with her, then that does constitute rape,[18] although it must be proved that the unwillingness of the woman was overcome by the deliberate administration of the drinks or drugs.

In modern Scots law, rape is still defined as sexual intercourse with a woman "forcibly and against her will".[19] It must be shown that the woman's resistance was overcome, and that she did not consent to intercourse. Thus force clearly still remains a key test of rape, although the degree of force required is a question of fact in each individual case. As well as actual force such as physical violence towards the woman, force can also include what is known as constructive force, such as certain types of imminent threats to the woman or a third party (such as her child) or , and drugging her with drink or drugs.[20] The phrase 'against her will' means that positive or implied non-consent must be shown. It must be shown that the woman's will was overcome. Where the woman is not in a conscious state, there is a need to

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14 *HMA v Charles Sweenie* (1858) 31vv 109
15 Jones, TH & Christie, MGA, (1992) *Criminal Law*
16 ibid.
17 *HMA v Grainger and Rae*
18 *HMA v Logan* 1935 JC 100
19 *Stallard v HMA* 1989 SCCR 248
20 Gane, C. (1992)

show that she was unwilling to have intercourse with the accused prior to becoming unconscious.

The law regarding rape within marriage in Scotland was recently amended, so that a husband who is living in the same house can now be charged with raping his wife. In the 1700's, the institutional writer Hume[21] expressed the view that a husband is immune to a charge of rape of his wife. This view was supported by later legal commentators.[22] Two cases in the 1980's went some way to overturning this long-held view when two husbands were convicted of a charge of raping their respective wives, although, in both cases, the men were not living with their wives at the time of the rape.[23] It was in 1989, however, that a husband was convicted of rape whilst living with his wife, and a husband's immunity in marital rape was finally revoked in Scotland.[24]

As stated in the previous chapter, in the case of girls under 12 years old (the age of puberty for girls in Scotland), rape can be committed without any overcoming of the girl's will. This is because a girl of that age is incapable of consenting or having a proper will in the matter at all.[25]

1.2 *Indecent Assault*

Indecent assault has not received much attention from Scots legal commentators. According to one contemporary commentator, this is possibly because it has long been regarded as an aggravated form of common assault, rather than a specific sexual offence (Gane 1992). As the term suggests, it is an assault accompanied by circumstances of indecency. It is a rather broad general offence, and encompasses a wide range of criminal behaviour. Although what is required is an assault of an 'indecent' character, the Scottish courts appear to have offered no definition or explanation of what actually constitutes 'indecency' in the context of indecent assault. Although, as Gane (1992) also points out, the courts tend to take a practical approach, with regard to all of the circumstances, when deciding whether an assault is indecent. Like any other form of assault, indecent assault must entail some form of 'attack' on the victim, although this need not be an overt physical attack, and it does not necessarily connote that the accused had to overcome any resistance on the part of the victim. Thus there need not be any physical contact, and an 'attack' could conceivably entail threatening

21 Hume i. 306
22 Macdonald, 119; Alison, i. 218
23 *HMA v Duffy* 1983 SLT 7; HMA v Paxton 1985 SLT 96
24 *Stallard v HMA* 1989 SLT 469
25 Gordon (1978) p.889

gestures.[26] Indecent assault is aggravated where the victim is a child. The offence may be committed by a member of either sex against a member of either sex.

Although indecent assault has a wide application, it may, in many circumstances, according to Gane,[27] be the only available charge that properly reflects the gravity of the accused's conduct. Given that the definition of rape is restricted to genital penetration, a range of other serious sexual assaults involving other types of penetration are excluded from the definition of rape, and these are charged as indecent assault.

1.3 *Assault with intent to ravish*

This rather archaic sounding offence is, like indecent assault, essentially an aggravated form of assault. However, unlike indecent assault, it can only be committed by a male against a female, in that it requires an intention to have penile intercourse with the victim. Again, this offence is aggravated if the victim is a child. This is a distinctively Scottish offence, there is no English equivalent.

2. *Statutory Law*

Currently, statutory sexual offences are encoded in the Sexual Offences (Scotland) Act 1976. The current Act consolidated almost all of the provisions of Scots law relating to sexual offences, specifically that introduced for the first time in the 1885 Criminal Law Amendment Act which applied to England and Wales and Scotland, and subsequent modifications to the 1885 Act which were made in 1922, and 1951. Prior to the 1885 Act, there was very little statute law relating to sexual offences in Scotland. Any statutes which existed were very old, such as the Incest Act 1567, or were largely in disuse. For example, brothels were regulated by a statute introduced in 1476 which stated that "common women be put at the end of the town where least perell of fire is",[28] and "fornication" had been dealt with by what Hume termed "a full an anxious statute of James VI".[29]

2.1 *s.2 Sexual Offence (Scotland) Act 1976 'Procuring by threats'*

This provision had its genesis in the 1885 Act, and was introduced as a means to stem what was perceived at the time to be a rising tide of prostitution. It appears as s.2 of the current Sexual Offences (Scotland) Act in a slightly reworded form and provides that it is an offence if any person:

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26 Gane (1992)

27 Gane (1992) p.53

28 1476 c74 quoted in *Journal of Jurisprudence* 1885 (29) Edinburgh, T & T Clark

29 Hume I 302, quoted in *Journal of Jurisprudence*: 1885 (29)

a) by threats or intimidation procures or attempts to procure any woman or girl to have unlawful sexual intercourse in any part of the world;
b) by false pretences or false representations procures any woman or girl to have any unlawful sexual intercourse in any part of the world;
c) applies or administers to, or causes to be taken by, any woman or girl any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful sexual intercourse with such women or girl.

Age does not enter as an element in this offence at all, and it is clear that it can be committed by a male or a female procurer. The maximum penalty for the offence is two years imprisonment under solemn procedure, and three months under summary procedure.

There appears to be no case law in Scotland on the meaning of this section of the Act, although Gordon (1967) states the view that the relative English law would be followed.[30] However, it is clear that intercourse must be "unlawful", which essentially means outwith marriage. It would appear that no offence occurs unless intercourse actually takes place.

2.2 *s.8 Sexual Offences (Scotland) Act 1976 'Abduction with intent to have sexual intercourse'*

This is essentially the statutory near-equivalent of the common law offence of abduction with intent to ravish, albeit much narrower in that it applies only to unmarried women under 18 years. In this, it reflects a concern with the preservation of property rights over a woman's property.[31] The older common law offence applies to a female of any age, irrespective of her marital status. S.8 provides that it is an offence to take an unmarried girl under the age of 18 years away from her parents or guardian in order for her to have unlawful sexual intercourse with a man. The woman must be 'taken' from her parents, and the fact that she consented is no defence. This offence may also be committed by someone other than the man with whom it is intended that the woman or girl have intercourse. The offence carries a maximum penalty of two years imprisonment on solemn procedure, and three months on summary procedure.

2.3 *s.9 Sexual Offences (Scotland) Act ' Unlawful detention of female'*

S.9(1) provides that it is an offence to detain a woman or girl against her will in any premises with intent that she may have unlawful sexual intercourse with any man; and that it is an offence to detain a woman or girl against her will in a brothel. This can be committed by a

30 Gordon, (1978) p.854
31 Gane, (1992) p.67

male or a female and carries a maximum penalty of two years on solemn conviction and three months on summary conviction. However, there appear to be no reported cases in Scotland on the application of this section.

Age-Specific Sexual Crimes and Offences

In Scots law there is an absolute prohibition on sexual relations with children of either sex below the age of puberty (which is 12 years for girls and 14 years for boys). Statutory provisions extend the common law prohibition on sexual relations with girls (not boys) beyond the age of puberty to make it a statutory offence to have sexual relations with a girl under the age of 16 years.

3. *Common Law*

Although sexual offences relating to children and young persons are more commonly associated with statute law, there remain a number of common law offences which specifically apply to young complainers. However, apart from rape, the common law sexual offences which apply to young female complainers do not involve penile penetration, but can be classified more generally as sexual assaults.

3.1 *Indecent Behaviour*

It is a crime at common law to indulge in indecent behaviour towards children under the age of puberty, with or without their consent. Indecent behaviour is aggravated by the relationship between those involved, for example between parent and child, or between teacher and pupil. Indecent behaviour covers a wide range of 'indecent' conduct towards children, and includes the specific offences of 'lewd, indecent and libidinous practices and behaviour' and 'shameless indecency'.

3.1.1 *Lewd, Indecent and Libidinous Practices and Behaviour*

An offence at common law, lewd and libidinous practices covers a wide range of indecent criminal conduct towards children below the age of puberty. (Both males and females can commit this offence. There is no need for actual physical contact, the offence may involve the accused indecently handling the child, or inducing the child to handle the accused. Gane (1992) contends that knowingly engaging in indecent conduct, such as sexual intercourse, in the presence of a child may also constitute lewd and libidinous practices.[32]

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32 Gane, (1992). p.74

For girls over the age of puberty and under the age of 16 years, this prohibition on lewd and libidinous practices is extended by a statutory measure, s.5 of the Sexual Offences (Scotland) Act 1976 (see under Statutory Law).

3.1.2 *Shameless indecency* [33]

Shameless indecency can apply to a wide variety of criminal behaviour, from showing indecent films to young girls to engaging in sexual acts in front of others. It need not involve sexual activity or actual physical contact. It does, however, have its origins in offences relating to lewd and indecent practices towards children, and has been used by the courts to cover a variety of situations. According to Gane (1992), there are three types of shameless indecency, those involving sexual relations; those involving an affront to public decency; and those which are likely to or are intended to deprave and corrupt public morals.[34]

Shameless indecency can take place in public and in private, and can be committed by a male towards another male, as well as by a male towards a female. (There appear to be no cases of shameless indecency between females.)

4. *Statutory Law*

Intercourse with a girl under the age of 12 years is charged as common law rape. In addition, non-consensual intercourse with a girl under the age of 16 years is also common law rape. However, currently it is a statutory offence to have unlawful sexual intercourse with a young woman under 16 years even where she does consent. When this extension was introduced by the 1885 Act it was entirely new, as hitherto in Scotland a girl over 12 years was regarded as "mistress of her own person".[35] Prior to 1885, it was not an offence to have intercourse with a consenting girl who had reached the age of 12 years, that being the age of puberty. The current statutory provisions are contained in the Sexual Offences (Scotland) Act 1976, which, as previously stated, consolidated almost all of the provisions of Scots law relating to sexual offences. The statute creates a number of quite specific sexual offences which apply when the victim is a young women or girl under 16 years of age.

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33 Shameless indecency is not specifically included under the list of offences covered by the Scottish shield legislation, although it is commonly considered indecent behaviour.

34 Gane, (1992) p.143

35 Lord Craighall in *HMA v Watson* 1885 in *The Scottish Law Reporter* vol. XXIII October 1885 - July 1886

4.1 *s.3(1) Sexual Offences (Scotland) Act 1976 'Intercourse with girl under 13 years'*

This provides that it is an offence to have or attempt to have unlawful sexual intercourse with any girl under the age of 13 years. It appears to be the practice, in terms of prosecution, to use this section only where the girl is over 12 years and under 13 years. In other words, this seems to apply only to 12 year old girls. As previously stated, sexual intercourse with a girl under 12 years (that is, under the age of puberty) is usually charged as common law rape. The maximum penalty for this offence is life imprisonment; an attempt to have unlawful intercourse with a girl under 13 years old incurs a maximum of two years on solemn conviction, and three months on summary conviction.

4.2 *s. 4(1) Sexual Offences (Scotland) Act 1976 'Intercourse with girl between 13 and 16 years'*

S.4(1) is similar to s.3(1) in that it provides that it is an offence to have or attempt to have unlawful sexual intercourse with a girl of or above the age of 13 years and under 16 years. Again the offence is one of 'unlawful' or extra-marital intercourse.[36]

The offences in both s.4(1) and s.3(1) are what are known as 'strict liability' offences with regard to the age of the girl. This means that it is no defence that the accused believed the girl to be over 16 years, no matter how 'reasonable' his belief. However, in respect of s.4(1) there is what Gane (1992) calls "a limited defence of error as to age".[37] This defence, commonly known as 'mistaken belief in age', applies if the male perpetrator is under 24 years of age and he "reasonably believed" that the girl was of, or above, 16 years. This defence is only available if the accused has not been charged with a like offence ('charged' does not mean 'convicted'). This defence does not apply to s.3(1).

4.3 *s.5 Sexual Offences (Scotland) Act 1976 'Indecent behaviour towards a girl between 12 years and 16 years'*

This statutory provision provides that it is an offence if any person uses lewd, indecent or libidinous practices or behaviour towards a girl over 12 years, which if used towards a girl under 12 years would constitute an offence at common law. This provision effectively extends the common law prohibition on indecent behaviour towards girls under 12 years. Unlike s.3(1) and s.4(1), this offence can be committed by a female as well as by a male.[38]

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36 It would be a defence to either s.3(1) or s.4(1) if the parties were married. Although under s.1 of the Marriage (Scotland) Act 1977 a marriage which has taken place in Scotland between persons either of whom is under 16 years old is considered void.

37 Gane, op. cit. p 72

38 *HMA v Walker & Another* Dundee High Court March 1976, unreported

Incest and Incest-Related Offences

The Incest and Related Offences (Scotland) Act 1986 introduced a number of reforms into the area of criminal law that deals with sexual relations between members of the same family or the same household. The statutory offences are designed to prohibit sexual intercourse between those whose relationship is such that it ought not be permitted, that is, within degrees of incest specified by the criminal law.

Prior to the introduction of the 1986 Act, the crime of incest was dealt with under the 1567 Incest Act, which incorporated the prohibitions on incest contained in the biblical chapter Leviticus. Before the passing of the 1567 Act, incest was an ecclesiastical offence. The 1567 Act, up until the time of its' reform in 1986, was still in the old Scots language, and criminalised the "abhominabill, vyle and filthy lust of incest". This ancient Act, which covered full and half-blood relationships to the degree of great-grandparents and great-grandchildren, and also a wide range of affine relationships, resulted in a range of prohibited relationships. There were a number of calls for reform to this area of law, and in 1981 the Scottish Law Commission reported on the law of incest[39] and made a number of recommendations. These recommendations included that incest should be restricted to sexual intercourse between persons related by consanguinity or adoption; that intercourse between step-children and step-parents should be a criminal offence; and that it should be an offence for anyone over the age of 16 years to have intercourse with a child under the age of 16 years if he or she is a member of the same household as the child and stands in a position of trust or authority in relation to the child.

The recommendations of the Scottish Law Commission on incest were accepted by Parliament, and formulated into the 1986 Incest and Related Offences (Scotland) Act. The current provisions relate specifically to sexual intercourse, so it follows that the offences are exclusively heterosexual. Sexual intercourse has the same meaning as in rape in that incest is constituted solely by the act of penetration of the vagina by the penis. Consent is no defence to incest. In that the provisions relate to sexual intercourse, they are somewhat narrower than similar provisions in other jurisdictions, which extend to other forms of sexual behaviour.

s.2A Incest and Related Offences (Scotland) Act 1986

s.2A contains the revised offence of incest. It is similar to the 1567 ruling in that with regard to consanguinity, sexual intercourse is prohibited in the line of ascent and descent to great-grandparents and great-grandchildren. The prohibitions extend to full and half-blood

[39] The Law of Incest in Scotland 1981 Cmnd 84222B

relationships, and include consanguine relationships through illegitimacy, where the relationship is traced through any person whose parents are not married to one another.

s.2B Incest and Related Offences (Scotland) Act 1986

This section, like s.2C of the Act, is primarily concerned with the protection of children and young persons from sexual abuse by adult members of the family or the same household. It provides that it is an offence if any step-parent (or former step-parent) has sexual intercourse with his or her step-child (or former step-child) if the step-child is either under 21 years, or, before reaching 18 years of age, has lived in the same household as the step-parent and has been treated as a child of his or her family. This is so even if the sexual intercourse takes place after the step-child has left the household, and irrespective of the age of the step-child at the time of the intercourse.

s.2C Incest and Related Offences (Scotland) Act 1986

s.2C is also concerned primarily with the protection of children, and provides that it is an offence if any person over the age of 16 years has sexual intercourse with any young person under the age of 16 years who is a member of the same household as the child, and is in a position of trust or authority. This offence is aimed at protecting those children who are not protected by the offence of incest (s2A) or are step-children (s2B).

There are four categories of statutory defence provided which relate to these offences. These are:

a) Lack of knowledge by accused of degree of relationship. This applies to s2A and 2B.

b) Reasonable belief by accused that other person was above the relevant age. This section applies to 2B and 2C

c) Absence of consent by accused. This section applies to s2A, 2B and 2C.

d) Proof that accused was married to other person by a marriage recognised as valid by Scots law. This defence applies to s2A, s2B and s2C.

s.80(7) Criminal Justice (Scotland) Act 1980

This offence, whilst it does not apply in the case of female victims, is covered by the legislation, and included here for completeness. The Criminal Justice (Scotland) Act 1980 formally decriminalised certain homosexual acts, although for some time before the introduction of the Act, it was policy in Scotland not to prosecute homosexual acts which took place in private between fully consenting males over the age of 21 years. The Act did not fully consolidate existing common and statutory law in the area, although it repealed the

statutory provisions regarding 'gross indecency'[40] between males and introduced new statutory provisions to deal with certain acts. It did not, however, affect the common law regarding exclusively homosexual acts, such as sodomy and those offences that constitute lewd and libidinous practices and shameless indecency.

s.80(7) of the Act provides that it is an offence to commit or procure a homosexual act otherwise than in private; without the consent of both parties; with a person under 21 years; and between merchant seamen on board ship.

Where s.80(7) is used in a charge of committing a homosexual act with a male under the age of 21 years, then there is a defence available to the accused if he had reasonable cause to believe that the young man had reached the age of 21 years. This is available if the accused is under 24 years and has not previously been charged with a like offence. This statutory defence is similar to that of a charge of unlawful sexual intercourse with a girl between 13 years and 16 years. The maximum penalty under s80(7) is two years imprisonment on solemn conviction and three months on summary conviction.

[40] Introduced by the 1885 Criminal Law Amendment Act

CHAPTER THREE

EVIDENCE, COURT PROCEDURE, AND THE ADVERSARIAL SYSTEM

This chapter outlines some important general legal and procedural features of the Scottish criminal trial system in order to provide a context for the more detailed description and analysis of the research data which will form the substance of later chapters. The aim here is first, to situate the criminal trial within the particular framework of the adversarial system and, second, to indicate the fundamental interconnectedness between the exercise of due process in the criminal court room and the use and function of evidence in criminal trials. Some general rules of evidence will be discussed, and certain features of evidence which are particularly characteristic of sexual offence trials will be introduced here, and elaborated upon in subsequent chapters.

The Adversarial System and Principles of Advocacy

In Scotland, like England and Wales, an adversarial system of criminal justice prevails. This system incorporates formal procedural rules which in turn structure the trial process. Procedure dictates that a trial should take place in open court, that is, in the presence of the accused and members of the public and, in the case of solemn proceedings, before a jury of 15 persons. It also dictates that the prosecution carries the burden of proof, and consequently has to produce sufficient evidence to justify the accusation(s) against the accused contained in the criminal charges. Failing that minimum there is no case to answer. Further, the core concept of criminal justice is that an accused person is innocent until proven guilty, and the public trial is an open demonstration of the process by which the guilt of the accused is proven. The fundamental purpose of the criminal trial, then, is to decide whether or not the criminal charges put forward by the prosecution can be substantiated by the evidence provided.

The main means of evidence in a criminal trial is likely to be the testimony of witnesses, who relay to the court their perceptions of things or events in reply to direct questioning by the prosecution and defence. Other important means of evidence are the presentation of various relevant documents and physical objects, and - particularly in cases involving sexual offences - the results of forensic analysis and the contents of medical reports. Evidence for legal purposes has been defined as

> "information which tends to prove or disprove any matter of fact the truth of which is submitted to judicial investigation."[1]

The adversarial criminal justice system is characterised by a particular method of proof, which in turn involves a distinctive style of advocacy in which the prosecution and defence engage in what is often referred to as a 'contest' to decide a case.

In simple terms, during the course of a criminal trial evidence is elicited by the prosecution through the examination of each prosecution witness and presented to the judge/sheriff and jury.[2] This is known as the prosecution examination-in-chief, the ideal form of which has been described as a "spontaneous conversation"[3] between the prosecution and witness. Here, evidence is not presented directly by each witness, but in response to prosecution questioning. It is said that such questions should be short, clear, and unambiguous, yet at the same time the skilful advocate will try to control the witness' testimony to ensure that the court hears a factual and logical account.[4] The defence, in turn, will then attempt to dispute or challenge the prosecution evidence through the cross-examination of each prosecution witness. Again, this is done by means of interrogatory questioning of witnesses. Following cross-examination, the prosecution may then re-examine the witness to clarify or to re-iterate parts of their testimony, perhaps to clear up any confusion arising from cross-examination, or counter any alternative explanation put forward by the defence during cross-examination. As one writer describing the art of the advocate put it,

> "if the witness has been badly mauled by the cross-examination, then the re-examination can attempt to put Humpty Dumpty back together again" [5]

After all prosecution witnesses have given their evidence, and the facts of the prosecution case have been stated, the entire procedure is reversed with the defence leading with the examination of defence witnesses and the prosecution following with the cross-examination of those witnesses. Re-examination of witnesses is this time done by the defence. When all witnesses, those for the prosecution and those for the defence, have given evidence both sides 'sum up' their case. Summing-up entails a drawing together of each witnesses' evidence and a pulling together of all of the evidential strands to produce 'the facts of the case', and it is here that the 'contest' reaches it apex. This is the stage at which the evidence is assembled and presented in a summative form. Here - as long as the recounting of it is

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1 Wilkinson, A.B. (1988) *The Scottish Law of Evidence* p.1

2 The evidence will be presented to a sheriff sitting alone if it is a trial under summary procedure, and to a judge or sheriff sitting with a jury if it is a trial heard under solemn procedure.

3 Du Cann, R. (1980) *The Art of the Advocate* p. 87

4 Walker, A.G. & Walker, N. M. (1964) *The Law of Evidence in Scotland*

5 Du Cann, (1980) p144

accurate, the evidence may be re-organised, and edited in parts to form a logical total of all that has gone before in the trial. Summing up is done first by the prosecution, and then by the defence and the judge and jury are therefore presented with two (or more) conflicting versions of 'the case' on which to reach a verdict.

When describing the operation of the adversarial system, an analogy is often drawn in gladiatorial terms, likening prosecution and defence to adversaries or combatants engaged in a 'battle' over the evidence - putting forward opposing versions and parrying each others' claims before an audience of judge and jury.[6] Eventually a victor will emerge from this fight over the truth and meaning of evidence, and the case will be won or lost. As several critical writers have pointed out, the 'contest' between the prosecution and the defence is not necessarily one over the 'truth' or the 'probity' of, for example, what *actually occurred* in a particular incident. Rather it is more accurately a 'contest' concerning *accounts* of the incident. McBarnet (1981), writing on the difference between an incident and a case maintains that,

> "Far from being 'the truth, the whole truth and nothing but the truth' a case is a biased construct .... not so much an exhaustively accurate version of what happened as one which is advantageous to one side. .... The good advocate is not concerned with reproducing incidents but producing cases ...." [7]

The depiction of the trial as 'contest' between advocates concerned with 'the production of a case' has led several writers, such as Carlen (1976) and Chambers and Millar (1986) to comment on the inherent theatricality of the adversarial court room [8] - wherein not only the opposing advocates, but other witnesses engage - albeit sometimes unwittingly - in high drama (set, of course, within an appropriate legal context) which is presented before an audience of judge and jury. Accounts of the incident are presented to the court primarily via the verbal evidence of witnesses, but also from other evidential sources such as physical Crown productions, and consequently much of the adversarial 'contest' is over the authenticity and meaning of this available evidence.

But however colourful and compelling this image of the criminal trial as a tournament of truth-finding, it is a somewhat inaccurate portrayal. The two opponents, although in one sense representing opposing interests, are not on an equitable or balanced footing. To

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[6] See, for example, Frank, J. (1949) *Courts on Trial : Myth and Reality in American Justice*

[7] McBarnet, D. (1981) *Conviction*

[8] Carlen, P. (1976) *Magistrates Justice* for example used the theatrical metaphor to describe magistrates courts in England. Similarly, Chambers, G. & Millar, A. (1986) *Prosecuting Sexual Assault* adopted the metaphor of 'the stage setting' when describing women's experience in the witness box giving evidence in rape trials in Scotland.

continue with the gladiatorial analogy - it could be said that they wear different armour and carry different arms to the battle. Their fundamental purposes in the fight also differ. These differences are so much a fundamental part of the formal adversarial system - indeed they are at the very root of the system - that it led Brown et al (1993) to maintain that it is more accurately termed an *asymmetrical* adversarial system.[9] There are several reasons for this perceived asymmetry - the roots of which lie in the respective roles and duties of the defence and, in particular, the prosecution.

The Role of Prosecution and Defence

Duty to the Court

In Scotland, as in England and Wales, there is a system of public prosecution in place. The prosecution represents the interests of the Crown (which is in turn seen as the interests of the public at large) in a criminal trial, whilst the defence represents the interests of the accused. So far as matters of law are concerned, the duty of the prosecution is to the court, and he or she has a duty to bring to the attention of the court any and every relevant statute or decided case of which he or she has knowledge. As regards matters of fact, the prosecution must present all of the facts of the case to the court whether or not they are favourable or unfavourable to the prosecution case. It does not matter whether or not it is in the favour of the prosecution case to do so. He or she is obliged to disclose *all* of the evidence available, even if it is damaging to the prosecution case, or indeed, even if it is detrimental to the interests of the complainer. According to one criminal law commentator, the role of the prosecution is,

> "to assist the jury in arriving at the truth. He must not urge any argument that does not carry any weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole facts which compose his case, and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts .... the Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth be known, and that justice should be done."[10]

Unlike the prosecution, the defence does *not* have a duty to lay out all of the relevant facts in a case and therefore can be seen to have much more scope for creativity during the course of a trial. He or she is able to introduce a version of events which may be designed to confuse or contradict the prosecution case, and which could not be said to meet the same criteria as that demanded of the prosecution. However, the defence will be instructed by

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[9] Brown, B. et al (1993) *Sex Crimes on Trial* p.22

[10] Kenny, C.S. (1966) *Outlines of Criminal Law* p.612

his or her client (the accused), and the defence argument is based on the accused's version of events.

Burden of Proof

The burden of proof in a trial lies solely with the prosecution; and the standard of proof required is that the prosecutor must prove the charges against the accused beyond reasonable doubt. The defence is not constrained in the same way. Whilst it is the prosecutor's job to prove the case, that is, prove the defendant's *guilt* - the defence need do no more than pick holes in the prosecution case, or point to inconsistencies in an attempt to raise a reasonable doubt in the minds of the jury. The defence is not required to prove that which he or she puts forward in the trial in the same way as the prosecution is required to do so. In fact , the defence need not present any positive alternative to that put forward by the prosecution, merely raising reasonable doubt in the minds of the jury is enough to disprove the prosecution case. Often this raising of doubt can be done quite simply by introducing some ambiguity back into the case after the presentation of the 'logical or 'factual' prosecution account.

What The Prosecution Has To Prove

In a criminal trial, two things have to be proved by the prosecution. First, that the crime or offence outlined in the criminal charges took place; second, that it was the accused who committed it. Thus, evidence is used to address both the individual elements of the crime, and to determine whether the accused committed the crime. To take each of these in turn, first, each offence has its own specific definition which requires to be addressed by evidence. The legal definitions of sexual offences have already been discussed in some detail in Chapter Two, but it is nevertheless useful to draw on that information again here to illustrate some of the most significant criteria involved in the proving of sexual offences. For example, in the cases of rape and 'unlawful sexual intercourse' (i.e. ss 3 and 4 of the Sexual Offences (Scotland) Act 1976) it has to be proved by the prosecution beyond reasonable doubt that actual heterosexual intercourse took place; that is, that penetration, no matter how slight, of the vagina by the penis occurred. There does not necessarily have to be any emission of semen. If penetration did not occur, then it could not be said that rape or 'unlawful sexual intercourse' took place, however there may be evidence that what took place was actually attempted rape or 'unlawful sexual behaviour' (i.e. s 5. of the Sexual Offences (Scotland) Act 1976). Therefore, there has to be detailed questioning, usually of the complainer, about the degree of sexual penetration. Similarly, in the case of attempted rape and assault with intent to ravish, it has to be proved that the accused intended to

achieve sexual intercourse. Again, the precise stage which the assault had reached has to be established, primarily through the evidence of the complainer.

A second significant legal element of crimes such as rape, attempted rape, and assault with intent to ravish which requires to be proved by the prosecution beyond reasonable doubt is that the complainer was an unwilling partner throughout, that is, that she did not consent. Under current Scots law, rape is defined as sexual intercourse with a woman 'forcibly and against her will'.[11] It is thus necessary to prove that the complainer's will was overcome, and she is therefore questioned closely about her non-consent to sex. Evidence of lack of consent will not however necessarily lead to a conviction for rape. Since the case of *Meek and Others v HMA* it has been held that an honest and genuine belief in consent, even if unreasonable, can be a defence to a charge of rape.[12]

The prosecution also has to prove beyond reasonable doubt that it was indeed the accused who was the perpetrator of the crime. The complainer may have already identified the accused as the perpetrator in an identification parade held at a police station. Nevertheless, she will still be required to identify him in the trial. The accused may also be identified as having had sex with the complainer through forensic evidence, and fairly frequently in sexual offence trials, the accused will admit to having had sexual intercourse with the complainer. However, in such cases, the accused will often maintain that the intercourse took place consensually. Because the issue of consent is of such central importance in sexual offence trials, the complainer will often be closely questioned about such details .

The Accused, the Complainer and the Witness Box

Because the onus of proof lies with the prosecution, the accused does not have to answer the charges against him and can decide not to give evidence in the trial, should he not wish to do so (or should he be advised against giving evidence by his defence counsel). Thus, many accused neatly avoid the ordeal of giving evidence in a trial. By not speaking in court, the defendant is exercising his right to silence,[13] which is a not uncommon occurrence in criminal trials. The research documented here confirms this general tendency, and in the observed contested trials, only a very small number (approx. 10 %) of defendants entered the dock to give evidence. The accused is not compellable and he need not incriminate himself; in other words, the prosecution has to be able to prove the case without the co-operation of the accused. To reiterate, neither the accused, nor his defence

[11] *Stallard v HMA* 1989 SCCR 248
[12] *Meek and Others v HMA* [1982 SCCR 613]
[13] Since modified in England and Wales

counsel, need prove anything. Other defence witnesses, although cited as witnesses, may or may not be called to give evidence in the trial, depending on the judgement of the defence. Often defence counsel will wait 'to see how the wind blows' before deciding to bring on a particular witness, and will often play a canny game of withholding some witnesses altogether, or fielding a particular witness at an appropriate time in the trial, playing all of the time for maximum disruption to the prosecution case.

The prosecution witnesses, on the other hand, are of crucial importance to the prosecution, for it is their testimony, spoken in court, which forms the backbone of the prosecution case. The main witness for the prosecution in a sexual offence trial is, of course, the complainer although, in practice, she is treated in the same way as any prosecution witness at a trial. The relationship between the complainer and the prosecution is very different from that which exists between the defence and the accused. The prosecution is not representing the interests of the complainer in the same way as the defence represents those of the accused, but rather the prosecution represents the Crown and has to take account of the 'public interest' in presenting the case at trial. In their research into the Scottish prosecution service, Moody and Tombs (1982) found that prosecutors are very mindful of their role to take account of the 'public interest' both at the stage of deciding whether to prosecute and also during the trial.[14] Because of this, as Chambers and Millar (1986) assert, the complainer may often feel that :

> "she is peripheral to the key relationship at a trial, that between the State as representing the 'public interest' and the accused."[15]

The complainer's testimony is of the utmost importance for the prosecution case, and she has no alternative but to appear in the witness box, simply because if she did not there would be no case. Her evidence is usually the focus of the trial, the main event as it were. As indicated earlier, her evidence is crucial in relation to what the prosecution has to prove in sexual offence trials. Like other witnesses, she is required to give her account of events in response to questions put first by the prosecution. This will often entail not only an extremely detailed 'blow-by-blow' account of what happened in the hours (or sometimes days) leading up to the alleged incident, such as how she came to be with the accused in the first place, and the conversations that took place between them, but also what actually occurred during the alleged incident, and what she did immediately afterwards. The focus here is on recounting the detailed minutiae of what occurred - what parts of her body were touched, and how were they touched ? What did she do in response, how did she show her

[14] Moody, S. & Tombs, J. (1982) *Prosecution in the Public Interest*
[15] Chambers & Millar (1986) p.94

refusal to consent ? What did she say at the time of the assault ? What did she do immediately after the assault ? Who did she see and what did she say ? The complainer is almost always required to reiterate certain aspects of her account over and over again in reply to continual questioning by the prosecution. But giving an initial account (or more usually, a series of accounts) to the prosecution is not the end of the ordeal. Because the complainer is the chief prosecution witness, it follows that her testimony will receive the strongest attack from the defence. During cross-examination, the defence may seek to challenge the reliability and/or truthfulness of her account, usually in an attempt to undermine her credibility as a witness. Here, she may be subjected to further interrogation as to what happened before, during, and after the alleged incident, but she may also be cross-examined as to her lifestyle, her appearance, her demeanour, her relationships with others, her past sexual experience, and often her medico-gynaecological history[16] - often in a very hostile and intimidating way. There is much to support the view of writers such as Lees (1989) and Chambers and Millar (1986) that the complainer is as much 'on trial' in the court room as is the accused.[17]

General Issues in Evidence

It is often argued that the giving of evidence is a 'necessary ordeal' for the complainer, particularly in sexual offence trials which are perceived as serious crimes and thus carry the potential for severe sentencing. Evidence is, after all, of fundamental importance in relation to proof in criminal trials. There are some integral features of evidence which in turn dictate certain evidential requirements, the satisfaction of which, taken together with the rigorous style of many defence cross-examinations and the public nature of the court room, can further contribute to the ordeal of the complainer in sexual offence trials. In illustration of this, I turn first to a major evidential requirement, that of corroboration.

The Corroboration Rule

It is a general requirement of Scots criminal law that every material fact which has to be proved in order to secure a conviction in a criminal trial must be established by corroborated evidence.[18] 'Corroborated' evidence is evidence which emanates from more than one single independent source, and, as such, corroboration acts as an objective criterion for sufficiency of evidence. Hence, it is necessary for the prosecution to establish both the commission of the crime, and the accused's involvement in it, by evidence from more than one source. This rule applies in respect of all evidence and is imposed in

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[16] See, for example, Brown et al (1993); Adler, Z. (1987) *Rape on Trial* .

[17] Lees, S. (1989) Trial by Rape' *New Statesman and Society* 24 November : Chambers & Millar, (1986)

[18] Walker & Walker, (1964)

relation to all crimes and offences. The corroboration requirement has a long history in Scots law.[19] The 18th century institutional writer Baron Hume wrote:

> "No one shall in any case be convicted on the testimony of a single witness. No matter how trivial the offence, or how high so ever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person liberty or fame of his neighbour ..."[20]

This is unlike the situation in England and Wales where the evidence of a single witness, if believed, is sufficient to prove the case against the accused; that is, however, with the exception of certain sexual offences in England and Wales , such as procuration, where the woman's evidence alone is not sufficient to secure a conviction. In other sexual offence cases in England and Wales, corroboration is not actually required, but the judge is obliged to warn the jury of convicting solely on the basis of the evidence of the complainant.[21] This is so in all sexual offence cases, involving both female and male complainants, although the need for corroboration tends to be seen mostly in terms of female complainants. Until relatively recently, the corroboration warning was also administered in cases involving the sworn evidence of children in England and Wales. In Scotland, however, the corroboration requirement affects all witnesses, and confirmatory evidence is required in all trials, not only those concerned with sexual assault. It also applies equally to evidence elicited from children and young persons, as it does to that elicited from adult witnesses. Indeed following the removal, in England and Wales, of the corroboration warning in cases involving children, the Scottish view was that to remove the requirement only in relation to children would be "unprincipled and anomalous" in Scots law[22] (see Chapter One).

The cautionary instruction in sexual offence cases heard in England and Wales has, unsurprisingly, been much criticised by feminist authors, as insulting, anachronistic, and indicative of a gender bias in the law.[23] Temkin (1987) for example, argues that the justification for the English corroboration warning is "to protect men from the alleged fabrication of women." The underlying rationale on which the cautionary instruction rests is that women are less able to tell the truth in sexual matters, and are more prone to tell lies and make

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19 Until relatively recently, the corroboration rule applied to essential matters in both criminal and civil law in Scotland. In 1986 this requirement was removed in relation to personal injuries cases (Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 s9), and with effect from 1989 the Civil Evidence (Scotland) Act 1988 removed this requirement from other civil cases.

20 Baron Hume *Commentaries on the Law of Scotland respecting Crimes* (published 1797 - 1800) Vol. II p383

21 Temkin, J. (1987) *Rape and the Legal Process* p.133

22 Dent & Flin (1992) p.132

23 See, for example, Temkin, (1987) Edwards, S. (1981) *Female Sexuality and the Law* ;

false allegations of sexual assault due to their inherent capacity for fantasy, jealousy, spite, revenge, lying and general mischief-making. Women lie about sex because women lie about sex - so goes the tautology - hence women alleging sexual assault are not to be trusted. Edwards (1981) locates both the concern with the importance of corroborative evidence in sexual offence trials and the idea of women as hysterics and sexual fantasisers as stemming from medical and psychoanalytic discourses of knowledge that since the 1800's have been assimilated into law and legal procedure. She asserts that it is specifically from within the writings of medical jurisprudence, which reflect medical and psychological theory (and the assumptions and fundamental misconceptions about female sexuality contained within these theories), that

> "police, police surgeons, counsel, judges, and 'significant others' are most likely to derive and assimilate ideas on the nature of femininity and female sexuality in the context of formulating impressions of rape allegations and of the predilections of sexual assault complainers."[24]

Certainly allegations of sexual assault by female complainers is treated with a great deal of suspicion, not only within the court, but elsewhere within the criminal justice system. For confirmation of this, one need only consider, for example, judicial pronouncements to juries on the veracity of female rape complainants such as

> "The experience of these courts is that sometimes women make up such charges - I ask you to accept that. It is dangerous to convict in a sexual case on the word of a woman." [25]

Similarly the infamous statement by a judge that:

> "It is well known that women in particular and small boys are liable to be untruthful and invent stories." (Judge Sutcliffe, 1976)

I would tend to agree with Smart (1989) who contends that, although the judge refers only to small boys, "one should not assume that girls escape the sweep of his judgement."[26] Other examples of such conceptions of women as liars and prone to making false allegations can be found in instructions to police officers investigating rape and to police surgeons. Up until very recently, when most police forces changed their procedures for the investigation

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[24] Edwards (1981) p..120

[25] Temkin (1987) p. 136. See also Adler (1987) for further examples of cases where judges pronounced on the likelihood of false allegations by rape complainants

[26] Smart, C. (1989) *Feminism and the Power of Law* p.53

of sexual assault, such documents highlighted the possibility of false allegation on the part of those alleging sexual assault. [27]

Because the corroboration rule applies universally does not mean to say that proving sexual assault cases in Scotland is any less difficult than it is in England and Wales. Corroboration can take a variety of forms, for example, it can take the form of direct testimony of two or more witnesses to the facts; the evidence of a single witness may be corroborated by evidence of surrounding facts and circumstances; evidence can be derived from two or more sources of facts and circumstances alone; or a series of similar acts may afford mutual corroboration of each other. [28]

In general, independent corroboration of a complainer's account of an event can potentially come from such sources as other witnesses, who saw or overheard something which would confirm what the complainer alleged; it could also come from physical evidence which shows what the complainer alleged; it may also emanate from medical or forensic sources. But cases of sexual assault, by their very nature, are often very difficult to corroborate. Incidents of sexual assault generally take place in relative privacy, often inside a home or enclosed space. There are rarely witnesses. Physical evidence, such as torn or muddied clothing, medical evidence such as cuts or bruising or swollen genitals, and forensic evidence, such as traces of semen and saliva, are so open to multiple interpretation that they rarely provide conclusive corroboration. So, although the prosecution may introduce evidence such as torn clothing to substantiate an assault, the defence will often rebut it by, for example, suggesting the clothing was torn for some other reason even, perhaps, deliberately torn by the complainer out of malice. Similarly, the prosecution may bring evidence of swollen genitals to corroborate a sexual assault, but the defence will offer an alternative interpretation suggesting that the swelling was either self-inflicted or due to 'normal' sex play. Chambers and Millar (1986) and Brown et al (1993) writing about Scottish sexual offence trials documented both of these tendencies on the part of the defence. Chambers and Millar, (1986) for example, describe a case where it was suggested by the defence that a woman had thrown herself against furniture in order to scar her back, and another where clear signs of physical injury on the complainer were referred to by the defence as "part of the lovemaking process." (1986, p.97). Similarly, Brown et al (1993) describe a case where bruises and abrasions on the body of the complainer were turned around by

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[27] Burman, M. & Lloyd, S. *Police Specialist Units for the Investigation of Crimes of Violence Against Women and Children In Scotland*. (1992)

[28] This is known as the *Moorov Doctrine*. The leading case is *Moorov v HMA* which concerned a number of charges of indecent assault. The only direct evidence in each case was that of the woman assaulted. However it was held that there was sufficient interrelation in time, place and circumstances between each of the indecent assaults to afford their mutual corroboration.

the defence into the results of nothing more than "the rough and tumble of normal sex." Clearly, the same assumptions concerning female sexuality that underpin the rationale of the corroboration warning in England and Wales undoubtedly inform defence rhetoric and reasoning in Scotland.

Signs of injury presented by the prosecution as evidence of, for example, violence perpetrated by the accused, or indication of the complainer's lack of consent to sex, are therefore open to interpretation in a number of ways, and the defence are often both quick and inventive in their presentation of alternative interpretations. Forensic evidence presents similar problems for corroboration. For example, the presence of the accused's semen may be construed as evidence of consensual sex just as much as nonconsensual sex. Furthermore, forensic scientists and medical witnesses are notoriously difficult to pin down to a definite statement concerning the precise evidential meaning of their findings. In cases observed in this study, the majority of forensic and medical witnesses would go no further than state that their findings were no more than "consistent with" the prosecution account. But equally, under cross-examination, they invariably stated that their findings were also "consistent with" the defence alternative. In only a small handful of cases were such witnesses prepared to categorically state that their findings were totally consistent with the prosecution account and no other. This hesitancy on the part of such witnesses to commit themselves one way or another in such circumstances is precisely because of the possibility of ambiguity of aspects of medical and forensic evidence and, as such, is a further indication of the corroboration difficulties inherent in sexual offence trials.

Credibility and Reliability

All witnesses, as primary sources of evidence, may be tested for credibility and reliability. Credibility usually refers to the witnesses' sincerity or desire to tell the truth, that is, does she or he wish to tell the truth ? Is the evidence given by the witness to be trusted ? Is it tenable ? Credibility relates to notions of witness interest or motive for lying. For example, cross-examination as to the credibility of a witness may include questions on his or her relationship to the accused, the witness's motive for giving evidence, and any interest (financial or vested) that he or she may have in the case.[29] As stated earlier, cross-examination is not limited to matters on which the witness has given evidence in the prosecution examination; it may also range beyond those matters so as to elicit facts not already brought out which may be in favour of the defence, or with a view to destroying the credibility of the witness. However, evidence cannot be led if its only purpose is to reflect on the witness's credibility, although evidence which is otherwise relevant may also

[29] Wilkinson (1988) p160-161

be used to test (or discredit) credibility. One general exception to this exclusion of evidence bearing solely on credibility is where there is a question of inconsistency in the witness's statements, where, for example, the witness has given different accounts of the matter in issue. Consistent statements are, as one may expect, a key test of a witness's credibility, measuring whether the witness is uniform in the telling and repeating of his or her version of events.

In sexual offence trials, largely, it is said, because of the particular difficulties which are presented by the need for corroboration (see above) both the substance of the testimony of the complainer, and her honesty and truthfulness are focused on very strongly. Consequently, the credibility of the complainer often comes under close scrutiny, particularly in cross-examination by the defence. Does she have a motive for not telling the truth ? Is she bent on revenge against the accused ? Is she trying to hide an illicit love affair ?

The requirement of reliability is like credibility, in it refers to the dependability of the witness's account. But reliability concerns the witness's *capacity* to tell the truth, rather than the witness's desire to tell the truth. For example, sometimes a witness may try to tell what they believe to be the truth, but they may be mistaken, either because they misheard, or did not see what was happening, or because their memory has since faded. Mental and physical competence is obviously important here. Similarly, evidence of drinking or drug-taking prior to the witnessed event is often introduced to dispute the reliability of witness testimony. As is the case with the question of credibility, and again, it is said, due to corroboration requirements, the reliability of a complainer in a sexual offence trial is strongly focused upon. Can she really remember the events ? Is her recollection clouded in any way ?

The issue of reliability takes on another dimension when children and young people are concerned. Children and young people, primarily due to their age, are often considered to be unreliable witnesses - they may misinterpret events, they may not fully understand situations, and this is reflected in their unreliable testimony. It has been said that the view of young people as unreliable witnesses tends to be more associated with judicial pronouncements made in the English courts than the Scottish courts,[30] however the research documented here found that, in sexual offence trials, presumptions concerning the unreliability of children and young people are not uncommon, and this is evident in the focus on questioning which appears designed to test reliability. As well as questioning to

[30] Dent, & Flin (1992)

test recollection, there is considerable use of questioning by the defence which raises the possibility that evidence given by the young complainer is the result of fantasy and imagination. Again, it should be reiterated that there is no need for the defence to do more than 'put' such suggestions, in order to raise doubt as to reliability. Indeed, the adversarial system allows the defence much scope, in the trial situation, to utilise a wide and creative range of questioning and suggestive techniques to discredit complainers and undermine both their credibility and reliability as witnesses.

Several studies[31] have shown that such views on the reliability of women and children witnesses are prevalent in court room attitudes and in court room practice, even though there is no research evidence to suggest that victims of sexual assault are more likely than victims of other crimes and offences to make false allegations and lie about events.

To turn now to another primary rule of evidence, that is, the requirement that evidence be relevant and admissible.

The Relevance and Admissibility of Evidence

In order to be led in a trial, evidence has to be deemed to be admissible. The criterion of admissibility is the relevance of the evidence. Evidence is admissible *only* if it is relevant to the facts on which the judge or the jury have to decide. To be relevant, evidence must relate directly to the facts at issue in the case, or facts bearing on the credibility of witnesses. In a criminal trial, the judge has the right to exclude evidence which is considered to be irrelevant, and to impose restrictions on the questioning of witnesses if such questioning is considered to be irrelevant.

The common law in Scotland used to be that, in cases of rape and other sexual offences, the sexual character of the complainer might be the subject of evidence as relevant to the issue of consent. However, since the introduction of the 'shield' legislation, this position has changed somewhat and this will be discussed in more detail in the following chapter. Suffice it to say at this stage that the old common law rules regulating the use of sexual character evidence were superseded by the 'shield' legislation, so that, presently, questioning designed to elicit evidence which shows or tends to show that the complainer, is not of good character in relation to sexual matters; is a prostitute or associate of prostitutes or; has at any time engaged with any person in sexual behaviour not forming

[31] Chambers & Millar (1986) ; Adler, Z. (1987) ; Brown et al (1993)

part of the charge, is excluded. However, there are exceptions to this general exclusion, wherein such evidence may be introduced if it is considered relevant to issues in the trial.

To sum up, this chapter has tried to lay bare the trial process using the 'logic' of the adversarial system and the rules of evidence as a means of elucidating the legal-evidential procedures that occur in criminal trials. The aim has been to situate the criminal trial within the context of the constraints and determinants of the institutional structure that comprises our public prosecution system. What one observes in a criminal trial then is the result of a complex interaction between the general principles of the law (such as the requirement to prove the case against the accused beyond all reasonable doubt, the right of the accused to a fair trial, the burden of proof - that is, what McBarnet has called "the rhetoric of justice"[32]) and the operation of formal rules of law and legal procedures (that is, the operationalising of the law, such as what is permitted by statute, the use of case law, and what is deemed acceptable evidence). In the trial, the original event is reconstructed within this mesh of rules and principles that constitute the adversarial system.

Obviously, this interplay of legal and procedural conventions has a strong bearing on the complainer's experience at court, regardless of the type of crime or offence. Whilst defenders of the present system view the process of giving evidence followed by cross-examination as part of the routine workings of the system, the victim of a crime as a witness (and also as an observer of the process) experiences the trial situation in a very different way. McBarnet (1983) has argued that feelings of degradation and humiliation may be experienced by all victims in the court room and that this feeling is not incidental, but rather structural to the court proceedings.[33] In the court room, because the victim is no more and no less than any other prosecution witness, he or she is placed in a position of vulnerability and is at the mercy of questioning by both prosecution and defence. The adversarial nature of advocacy and the legal rules that define the construction of 'truth' mean that victims are liable to be treated harshly by both sides.

The ordeal of giving evidence then, for all victims, can be severely testing. However, some writers argue that it is particularly so for victims of sexual assault, given the nature of the offence and the corroboration difficulties outlined earlier in this chapter.[34] It is argued that as a result of the protocol of having to give evidence in court, and by so doing, having to re-live and recount the original ordeal, as well as having to be cross-examined on that

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[32] McBarnet (1983) p.6

[33] McBarnet (1983) 'Victim In The Witness Box : Confronting Victimology's Stereotype' *Contemporary Crises* 7: pp293 - 303

[34] See for example, Temkin (1987); Adler (1987); Brown et al (1993)

evidence, the testing process of the trial can often constitute a form of secondary victimisation for the victim of sexual assault. In addition, in sexual offence trials, very often the extraction of relevant evidence can be a painful, humiliating and tortuous ordeal for the complainer. The trial process is, nonetheless, an inevitable ordeal given the structures of the present system with its processes of examination and cross-examination as a means of ascertaining the 'truth' (although this is not to deny that much of the ordeal experienced by complainers is unnecessary, particularly that which involves a focus on sexual evidence of dubious relevance). The point of this chapter has been to try to show some of the reasons why this should be the case.

CHAPTER FOUR

THE SCOTTISH 'SHIELD' LEGISLATION

Following on from the more general features of evidence outlined in the previous chapter, this chapter looks at sexual evidence in more detail. The first part of the chapter concerns the Scottish reformer's conceptions of the problematic nature of sexual evidence - why and how it was conceived as a problem to be curbed by the 'shield' legislation - and then outlines the 'solutions' put forward by the legislative reformers. It thus provides the background context necessary for assessing whether sexual evidence is present in sexual offence cases involving young female complainers and, if so, whether its' use has the same problematic consequences as in trials involving adult female complainers.

However, the process of the Scottish law reform also requires to be put into context. The following section briefly sets out the immediate precursors to the Scottish reform of sexual evidence which preceded the passing of the 'shield' legislation.

The Impetus Behind the 'Shield' Legislation

In Scotland, the sexual evidence reform did not stem directly from a concern with the law on rape, as it did in England and Wales. Rather sexual evidence came under scrutiny within the wider context of a general programme of revision of the whole of the law of evidence which was being undertaken by the Scottish Law Commission.[1] The reform process is documented in detail by Brown et al (1993)[2] and only a brief outline of the process will be given here. In the late 1970's a practising sheriff, Ian MacPhail, was commissioned to review the law of evidence in both criminal and civil matters, and to pinpoint those areas in need of reform. In the subsequent MacPhail Report (1979) which put forward several proposals for change, sexual evidence was discussed in the context of general issues of character evidence.[3] The circulation of this report in the form of a consultation document heralded the beginning of the reform process. It is interesting to note however, that it was initially envisaged by the Scottish Law Commission that the reform process would

[1] The Scottish Law Commission is an independent body set up by Parliament in 1965 for the purpose of planning and conducting law reform. Some of their work originates in suggestions from the public; they consult widely and receive responses to papers The SLC prepares reports proposing draft statutes which are laid before Parliament.

[2] Brown, B., Burman, M. & Jamieson, L. (1993) *Sex Crimes on Trial : The Use of Sexual Evidence in the Scottish Courts*

[3] This report was subsequently published as MacPhail, I. (1987) *Evidence: A Revised Version of a Research Paper on the Law of Evidence* Edinburgh, Law Society of Scotland

commence with the law of evidence in civil, rather than criminal, law. However, a number of events took place which conspired to alter the order of reform, and which together placed the reform of sexual evidence higher on the Scottish law reform agenda.

As documented by Shapland et al (1985) and Maguire and Pointing (1988), the early 1980's were a time of fast growing academic, policy and public interest in the needs and rights of victims of crime, and in particular, their treatment within the criminal justice system.[4] The general concern about, amongst other things, the lack of provision of information to victims about the legal process and the ordeal of giving evidence, dovetailed with the concerns that feminist and victim support groups had been expressing about the experience of rape victims. Against this background, the early 1980's also saw increasing concern about the investigation of sexual assault and the conduct of rape trials, although interestingly, this concern was not directly about sexual evidence but more about methods of investigation and decision-making in rape cases. Partly triggered by a television 'fly on the wall' documentary which showed officers from Thames Valley Police investigating an allegation of rape, public concern swelled following some notable resolutions of rape cases heard in the courts during 1982. The first of these concerned a Scottish appeal case, *Meek and Others v HMA*, in which the defendants had been convicted of raping a young woman in a country field.[5] On appeal, they claimed that they had come across her having sex with a group of young men and so they thought she was willing to have sex with them. This appeal, in effect, raised the defence of 'honest belief'. The 'honest belief defence' had been established somewhat controversially in an earlier English case *Morgan*, in which it was validated that a man had not committed rape if he genuinely believed that the woman was consenting at the time. (The *Morgan* ruling was in fact one of the precipitating factors of the reform of rape law in England and Wales.) In the *Meek* case though, the appeal failed on facts, although the principle of 'honest belief' was established.

A second controversial case of the same year, known as the Glasgow Rape Case also played a part in the prioritisation of sexual evidence in the Scottish reform process. Public opinion was outraged in this case, which involved the gang rape of a young woman in which she suffered horrendous stabbing injuries. The Crown dropped proceedings against the three youths involved before it went to court without notifying the victim. The reason for this was that she was deemed by the Crown to be unfit to give evidence in court. The

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[4] Shapland, J. , Willmore, J. & Duff, P. (1985) *Victims in the Criminal Justice System*; Maguire, M. & Pointing, J. (eds.) (1988) *Victims of Crime : A New Deal ?*

[5] *Meek and Others v HMA* 1982 SCCR 6143 and 1983 SLT 280 (Notes)

crux was that the trial was abandoned because of the woman's mental condition as a result of the trauma.[6] In this decision, the Crown took into account the contents of a psychiatric report which stated it would be dangerous for the woman's mental health for her to have to endure the trial process. In prosecutorial terms then, the victim's interest and welfare was taken into account in making the decision. This in fact was the real reason behind the decision, although matters were considerably clouded at the time that the decision was announced by a seemingly uninformed statement made to a journalist by the then Solicitor General for Scotland, Sir Nicholas Fairbairn. He confused an already complex situation by stating that the case had been dropped because

> "the prosecution did not have sufficient, competent or available evidence to stand any chance of gaining a conviction."[7]

He also claimed that the mental condition of the woman was "irrelevant". The case attracted vast amounts of publicity. The case was soon taken up by a Glasgow lawyer and a journalist and a private prosecution eventually took place, capturing much media and public attention in the process. 1982 also saw a third controversial rape ruling, this time an English case. This case involved the rape of a young hitchhiker by a lorry driver. In passing sentence, the judge found that the victim's "contributory negligence" had precipitated the rape and so fined the accused £2,000. In making such a statement, the judge effectively put some blame for the rape onto the victim. The light sentence and the suggestion that negligence was a relevant factor in rape caused outrage amongst academics, women's groups and journalists.

There were however other events of the early 1980's that facilitated the Scottish reform of sexual evidence, in addition to those three controversial rape cases of 1982 (which all involved adult women). Feminist groups in Scotland (as in England and Wales) at this time were campaigning against the treatment of rape victims in the criminal justice system, and there were calls in the early 1980's by Scottish Rape Crisis Centres pressing for changes in the law for victims of rape who could not face the ordeal of the witness box to be allowed to give written evidence.[8] As previously stated, there had been reforms of rape law in several other jurisdictions around the world, including England and Wales.[9] The

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[6] Harper, R. and McWhinnie, A. (1983) *The Glasgow Rape Case*

[7] Harper, R. & McWhinnie, A (1983) p.95

[8] s.32 of the Criminal Justice (Scotland) Act 1980 gave the power to the Crown in a criminal trial to apply to the court to take evidence 'in commission' from witnesses who were either too infirm to attend or were abroad. Rape Crisis Centres in Scotland were pressing for this to be extended to rape victims

[9] ss. 2 and 3 of the Sexual Offences (Amendment) Act 1976

workings of the English 'shield' legislation had been the subject of a study of rape trials conducted at the Old Bailey by Zsuszanna Adler and she began to make the results of this study public in 1982.[10] As Brown et al (1993) point out, not only did the publication of Adler's work express feminist concerns about the use of sexual history and sexual character evidence and the way it feeds into and reflects the stereotyping of women, but her work also pointed to the wide divide between the spirit of the policy aims behind the English/Welsh 'shield' legislation and the practice in the courts. It thus focused attention on the design of effective and workable legislation in the area of rape law reform, in particular, on sexual evidence

Towards the end of 1982, the Scottish Law Commission announced its revised intention to prioritise the reform of sexual evidence over that of evidence in civil procedure. The Commission's Report (1983) states that

> " many reforms on these aspects of the law of evidence have in recent years been taking place both in England and elsewhere in the world and that, particularly in the last year or two, there has been some demand for reform in Scotland coupled with considerable media interest in the subject of trials for rape"[11]

There had been demands for reform emanating from various quarters and, as the above quote suggests, the Scottish Law Commission clearly acknowledged these demands. The reform process proceeded by means of debates and the circulation of discussion and consultation documents in which the Scottish Law Commission variously set out their commitment to reform, their perceptions of the problems of sexual evidence and subsequent legislative proposals. It is clear from these debates and discussion that the reformers were guided throughout the reform process primarily by a concern with issues of principle in relation to the law of evidence.

The Problems of Sexual Evidence

The central aim of the reformers was

> "to see the law of evidence changed so as to provide that, while the court would continue to admit all the evidence necessary to ensure that justice is done to the accused , the exposure of the complainer to intimate, and possibly embarrassing, questioning is reduced to the minimum possible."[12]

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[10] Adler, Z. (1982) 'Rape : The Intention of Parliament and the Practice of the Courts' 45 *Modern Law Review*; Adler, Z. (1982) 'The Reality of Rape Trials' *New Society* 4th February; Adler, Z. (1982) 'Rape Law : The Latest Ruling' *New Law Journal* 5th August

[11] Scottish Law Commission (1983) *Evidence : Report on Evidence in Cases of Rape and Other Sexual Offences* para.12, p.1 also cited in Brown, B. et al (1993) *Sex Crimes on Trial*

[12] Scottish Courts Administration *Consultation Paper*, para.1.3

As Brown et al (1993) indicate, the aim of the reformers in framing the legislation was to achieve, overall, a *balance*. [13] On one side of the scales they wished to minimise the use of sexual evidence (in order to minimise the ordeal for the complainer), whilst on the other side of the scales they wished to continue to admit all relevant evidence in order for justice to be done to the accused. Sexual evidence incorporates both sexual history and sexual character evidence. Both can refer to many things, for example, sexual experience, past sexual relations and sexual reputation. Brown et al (1993) distinguish between sexual history and sexual character and it is their broad categorisations that I adopt here. They refer to sexual history evidence as specific information about particular facts, individuals and events. These may be occurrences prior to the alleged sexual offence, but equally, may occur after it.[14] Sexual character, on the other hand, refers to the 'typing' of a person, usually in moral terms of 'good' and 'bad' on the basis of generalised propensities.[15] Whilst law reform in several jurisdictions has conceded that sexual history evidence may be of some relevance in sexual offence trials, it is the use of sexual character evidence which has proved most problematic. As will be discussed later in this chapter, it was also the case that sexual character proved a thorny issue for the Scottish reformer.

As briefly stated in the Introduction, there were several different reasons given by the reformers for restricting sexual evidence. In the main these concern the problematic consequences brought about by the use of sexual evidence. Brown et al (1993) suggest that the reasons for restricting evidence (and thus averting the potential for problematic consequences) can be categorised in terms of whether they relate to certain policy goals, or whether they concern issues of principle relating to the law of evidence.

First, it was recognised by the reformers that the "trauma and distress" caused to the complainer by "intimate, or possibly embarrassing questioning" was a significant problem which required to be addressed.[16] It was also recognised that fear of the court room ordeal (as well as that of the police investigation) and a lack of belief in the capacity of the criminal justice system to achieve justice might be contributing to the unwillingness of victims to come forward to report sexual assault. Of course, this problem of under-reporting gave rise to the possibility that offenders were evading justice. Brown et al (1993) term the aim of

[13] Brown, B. et al (1993) chapter 1
[14] ibid. p.1
[15] ibid. p.2
[16] ibid. p.10

minimising distress to the complainer (and thus indirectly addressing the problem of under-reporting) as a primarily policy-related goal of the reformers.

This concern with the trauma that dealing with intrusive and embarrassing questioning may constitute for the complainer echoed in many ways feminist concerns about the subjective experience of the complainer in the witness box. Giving evidence in a sexual offence trial has been described by many feminist authors as almost a repetition of the rape itself, a form of secondary victimisation, a re-living of the original ordeal. Lees (1989), for example, described the giving of evidence in a rape trial as a "life-threatening experience" for the complainer; similarly, the depiction of the trial as a grossly intimidating, humiliating and horrendous experience was reported by the majority of women interviewed by Chambers and Millar (1986) in their study of the prosecution of rape and rape-related offences.[17] Of course, and as detailed in the previous chapter, it is not surprising to learn that having to answer questions on personal sexual matters in the public arena of the court room can be a particularly painful and abhorrent experience. The process of the trial with its focus on establishing evidence and cross-examination to ascertain the smallest details of the alleged incident can and does touch upon what many people would consider their most private concerns, and understandably gives rise to the tensions and fear associated with giving evidence in criminal trials. The public scrutiny of sexual experiences, sexual preferences and predilections, together with the production of, for example, photographs of her body parts, and the presentation of her underwear, can of course produce emotional reactions of embarrassment and humiliation on the part of the complainer.

In addition to voicing a concern about the complainer's ordeal caused by embarrassing and intrusive questioning, the reformers were also particularly concerned with what Brown et al (1993) identify as issues of principle in relation to the law of evidence itself. In Scots law, at the time of the reform, sexual character evidence whilst admissible (in principle, at least) in sexual crimes, was excluded in relation to other crimes. It thus held a rather anomalous position within the law of evidence. The reformers were concerned with this anomalous use of sexual character evidence in sexual offence trials and with the consequences of its' use, particularly with the potential that such evidence had for prejudicing a jury. In addressing the problems of sexual character evidence, the reformers had three main aims.

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[17] Chambers, G. & Millar, A. (1986) *Prosecuting Sexual Assault*

As briefly stated in the Introduction, the reformers specifically repudiated the validity of any sexual character construction of consent. Thus one of the main aims of the Scottish Law Commission was to outlaw any suggestion that because the complainer had sex with A or B then she would consent to sex with C.[18] In other words, they wished to prohibit a presumption of 'automatic' or indiscriminate consent by the complainer on the basis of her sexual history or sexual character. Although this sort of inference had been explicitly denounced in Scots law, there was a concern (voiced by some) that the practice of inferring consent on the basis of sexual character was creeping into the court room.

Second, the reformers were concerned with outlawing inferences made in the court room about the complainer's credibility on the basis of sexual evidence.[19] Although there was a precedent for this sort of inference in Scots law, the reformers repudiated such inference on the basis that it was archaic and out of touch with contemporary sexual behaviour patterns.

Third, the reformers were concerned with the possibility that sexual character evidence, even when not introduced as having a bearing on the issue of consent, may be taken that way by juries.[20]

Character Evidence

Many of the concerns of the law reformers centred on the problematic *potential* of sexual character evidence. As stated in the Introduction, the notion of 'character' is important in legal terms. It is usually defined in general moral terms and underpinned by the polarisations of 'good' and 'bad'. Embodied within the concept of 'character' is the notion of propensities or disposition towards certain forms of behaviour.[21] For example, to be of 'good' or 'bad' character may denote general propensities towards particular forms of acceptable or unacceptable conduct, such as honesty or dishonesty, although it may also be used in relation to reputation ('good' = respectable; 'bad' = disreputable or of 'ill repute'). It may also be used to attribute certain other characteristics, such as a disposition or habits towards certain sorts of conduct. 'Character' evidence is difficult to define precisely because it takes many forms and could potentially be drawn from any sort of evidence. Although the specificity of 'sexual' character makes this particular type of evidence

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[18] Scottish Law Commission (1983) *Evidence: Report on Evidence in Cases of Rape and Other Sexual Offences (Scottish Law Commission* No 78) para 5.1

[19] ibid. para. 5.3

[20] ibid. para. 5.3

[21] Wilkinson, A. B. (1986) *The Scottish Law of Evidence* p 30

somewhat easier to identify, it too suffers from problems that not only make it difficult to define precisely, but also render it very difficult to control in the trial setting. In general, 'sexual' character centres on allegations of (or allusions towards) particular forms of sexual conduct engaged in by the complainer (is she chaste ? lascivious ? promiscuous ? does she indulge in unusual sexual practices ?); her sexual reputation (is she of impeccable sexual character or of sexual ill repute?); and her sexual past (is she virginal or has she had any/many previous relationships ?) Obviously, 'bad' sexual character is constructed by evidence suggesting she is sexually immoral, promiscuous, unchaste, loose, indiscriminate. 'The exoneration of being of 'good' sexual character, in contrast, is reliant on evidence suggesting chastity, probity and sexual propriety.

Whilst 'character' is an accepted legal concept, it is recognised in Scots law that the use of 'character' evidence tends to distort legal judgement and is apt to lead to misrepresentation. As such, there are a number of protective conditions attached to the use of general 'character' evidence which preclude its use in certain circumstances and which serve to diminish the tendency towards misrepresentation and distortion. These legal protections are for witnesses, and particularly for the accused in a case. The conditions dictate the circumstances in which 'character' evidence can be used in a trial situation. For example, if a witness makes a claim to possessing a 'good' character, then they lay themselves open for cross-examination on their character which aims to show 'bad' character. Similarly, the prosecution may only lead evidence of the accused's character, whether by leading evidence or by cross-examination of prosecution witnesses, if the accused has set up the issue of his own character. If an accused were to cast imputations on the character of a prosecution witness, it would then expose him to cross-examination of his own character.

Sexual Character, Credibility and Consent

The Scottish law reformers were concerned with the concept of sexual character and the problems associated with sexual character, specifically 'bad' sexual character. Indeed throughout the process of reform, the thorny question of character evidence was a cause of much deliberation and a continuing source of anxiety to the reformers. As a result, the issue of sexual character underwent several reformulations in the process of reform. A main reason for the reformulation and reification and indeed, for the tentative air in which the legislators approached the question of sexual character, lay primarily in the state of the law of evidence in this area, and in particular the way that the question of sexual character was posed in relation to the issues of consent and credibility.

Prior to the reform the common law was that in cases of rape the character of the victim in relation to sexual matters might be the subject of evidence as relevant to the question of the complainer's consent and to her credibility.[22] However, this was subject to fairly stringent restrictions, in that specific acts of (prior) sexual intercourse with the accused could not be the subject of such evidence unless proximate in time with the alleged rape (time-restricted). Neither could acts of intercourse with other men, unless they were part of the *res gestae* of the case, that is, part of a set of incidents linked in time and place so as to be part of the same inter-connected event.[23] The authoritative source for this was the 19th century case of *Dickie v HMA*:

> "... [Concerning] individual acts of unchastity with other men at an interval of time. I am not aware that such evidence has ever been allowed, and indeed it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man - a proposition which is quite untenable." [24]

Whilst the position then was to firmly reject as untenable the proposition that a woman who consents to sex with one person may consent to sex with others on the basis of some disposition towards general or indiscriminate consent, it was however seen as legitimate to admit 'bad' sexual character evidence as relevant to the complainer's credibility. There are two main points of interest here. The first point of interest is that the admission of sexual character evidence in relation to credibility is an exception to the general rules of evidence which offer protections with regard to character evidence. But this exception has long been justified in Scots law in relation to trials for rape and assault with intent to rape on the basis that:

> "... proof of unchastity is circumstantial evidence to rebut the charge: while so much depends on the truth of her statements, and there is so great a risk of her story having been concocted in a fit of jealousy or with the view to extorting money or covering her shame when discovered in a voluntary connection that a full enquiry into her character is requisite to the jury to estimate her credibility."[25]

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[22] *Dickie v HMA* (1897) 24R (J) 82

[23] This is in some contrast to the English position where it was accepted that evidence of 'bad' sexual character was relevant as indicating consent with the accused and that such character could be shown through evidence of the complainer's sexual history with specific individuals

[24] Lord Justice Clerk MacDonald in *Dickie v HMA* 1897) 2 Adam 331 at p.337 cited in the Scottish Law Commission Report (1983) para.3.5 p.7

[25] Dickson, W.D. *Treatise on the Law of Evidence in Scotland* (as updated by SJ Hamilton Grierson) (T &T Clark, Edinburgh 1887) p.890

Clearly, this was a situation in which it was envisaged that a woman may lie (or more accurately, may consent to sex and then lie). This situation - or issue - specific approach is somewhat characteristic of the Scottish law of evidence in relation to character, in that certain stipulated situations and/or issues are considered to be relevant to character evidence and others are not. But this quote also raises other important issues, not least the inherent difficulties of corroboration in sexual offence trials and the consequent reliance on the complainer's version of events. The quote also raises the issues of acting out of interest or motive for lying, which are established aspects of credibility evidence used to test general credibility in that cross-examination as to credibility may include questions on any interest that a witness may have in the case, or any motive he or she may have for giving evidence in the case;[26] yet these are put forward by Dickson in the above quote as possible reasons why sexual character evidence should be allowed to assess specific credibility issues.

The second point of interest is the implied link between a woman's 'bad sexual character and repute' and her general credibility, which in a sense forms the background to the exception cited above. This biased link between sexual character and credibility is not specific to sexual offence trials. It has a long history in both criminal and civil evidence in Scotland, most notably in relation to prostitutes, and applies whether a woman was a victim or simply a witness in a trial. In general, the word of a woman of 'bad' sexual repute was held to be untrustworthy. In the 19th century case of *Dickie v HMA* it was stated that

> "it seems a relevant subject of enquiry whether the woman was at the time a person of reputed bad moral character, as bearing on her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her. Such evidence may seriously affect the inferences to be drawn from her conduct at the time." [27]

Thus the view was expressed that if there was evidence that a women was of loose and immoral character than this evidence could be of importance in relation to her credibility as to the issue of consent - and also with regard to the veracity of her evidence in general.

Some years before the Scottish Law Commission turned its attention to the reform of evidence in sexual offence trials, a report by Sheriff MacPhail which focused on sexual character and credibility, highlighted the problematic link between sexual immorality and

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[26] Wilkinson, A.B. (1986) *The Scottish Law of Evidence* p.160
[27] *Dickie v HMA* (1897) 24R (J) 82

untruthfulness. The MacPhail *Report* argued against the acceptability of this link on four grounds:

> 1. It is wrong to assume that a witness is likely to tell the truth because he or she is sexually immoral
> 2. Evidence of sexual immorality is rightly not generally admitted on the grounds of its relevance to credibility in any other class of crime
> 3. Although the evidence is admitted because of its assumed relevance to credibility, there is a danger that the jury will regard it as having a bearing on the issue of consent
> 4. It may be that the present admissibility of evidence of bad reputation has the result that victims of sexual offences who are of bad character are reluctant to report the offence to the police. [28]

Here, MacPhail is commenting on the broad equation between immorality and untruthfulness (unchaste women are liars) and the anomalous exception of sexual character evidence in the class of sexual crimes, but also on the potential deleterious effects of sexual character evidence in terms of its potential for conflating credibility and consent, and for contributing to the under reporting of sexual crimes.

The relationship of sexual character to the issue of consent has, at its root, the distinction between those who are 'chaste' and those who are 'unchaste' - the two opposing images of 'good' and 'bad' women and girls. The stereotypes of 'good' and 'bad' encompass particular notions of female sexuality - as those 'who do' and those 'who don't'. The implication is that those who are sexually experienced, who have consented to sex in the past, who have a sexual character, are more likely to consent to sex again. The articulation of a 'bad' sexual character sets up the general presumption or propensity towards consent on the part of the complainer, and as such has met with much censure from feminist critics, who argue against this notion of generalised consent as erroneous, outdated, and irrelevant. [29]

The pernicious use of sexual evidence as an index of the complainer's credibility has also been the subject of much criticism from feminist writers. Edwards (1981) attributes the use of sexual evidence to long-held assumptions about the nature of female sexuality which, over time, have become embodied in statutory law and legal procedure, and which are reproduced in legal practices within the court room. Specifically, she refers to the inferred relationship between the sexual character of the complainer and her credibility as a witness, wherein not only is an 'unchaste' woman, one who possesses a sexual history, presumed less likely to tell the truth than a 'chaste' woman, but also she is presumed to be

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[28] MacPhail *Report* para 16.09

[29] See, for example, Adler, A. (1987); Edwards, S. (1981)

more likely to make false allegations of sexual assault. The informing premise is that women with sexual histories lie, particularly about sex. It is this particular formulation which has given rise to the equation of sexual immorality with untruthfulness on the one hand, and the equation of chaste sexual innocence with truthfulness on the other. These presumptions linking sexual immorality with truthfulness carry a significant resonance for the complainer's perceived credibility in the court room. As such, the use of sexual evidence to undermine a complainer's credibility was one of the key instances of the use of sexual evidence which the reformers intended to address.

The legal reformers drew specific attention to the unacceptability of the implied link between immorality (or 'unchasteness') and truthfulness during the discussions and debates that preceded the passing of the 'shield' legislation. Moreover, they were particularly concerned with the position regarding the relevance of sexual character evidence. Whilst they endorsed the principle that lack of chastity or 'bad' sexual character should not be used to convey a general propensity to indiscriminate consent, they rejected the view that evidence of sexual character should not be allowed under a blanket exclusion.

Sexual Character and Relevance

The Scottish Law Commission, in their articulation of the problems of sexual character, were specifically concerned that character evidence was being routinely allowed in sexual offence trials simply as relevant to the complainer's general credibility. They therefore proposed a general prohibition on 'bad' sexual character evidence on the grounds that such evidence is uncertain and unspecifying and

> "opens the door to much that is irrelevant .... To admit such evidence is ... inconsistent with contemporary sexual attitudes; it may cause unnecessary distress to a complainer, and it may divert a jury from the proper issues in the case ... [it is] unlikely to be relevant to credibility or to a proper determination of the issues in a case."

This mirrors to some extent the problems pinpointed by MacPhail. However, it also highlights one of the main concerns voiced by the reformers and reiterated throughout the reform process, and that was the concern that the complainer be protected from undue and unnecessary, and possibly embarrassing, questioning about her sexual life. Clearly, it was thought that sexual character evidence had the potential for causing distress to the complainer. In a similar vein, MacPhail referred to the potential that such evidence had for contributing to a reluctance to report by victims of sexual offences.

There was also another important point of convergence between MacPhail and the Scottish Law Commission, and that was on the point of the relevance of evidence. The legal concept of relevance is a double-edged sword, as it were. On the one hand, relevance is a legal principle for excluding evidence, and the Scottish Law Commission strongly endorsed as irrelevant the exclusion of evidence introduced on the basis that because a woman has had consensual sex with A and B in the past, she can therefore be presumed to have consented with C - that is, a predisposition to consent constructed and introduced on the basis of sexual character. But unlike the old common law formulation, they saw no reason to restrict this to trials for rape and assault with intent to rape, but envisaged that it should apply to <u>all</u> crimes of a sexual nature.[30] Whilst there was no specific mention of, for example, the age-related offences and other sexual offences involving young complainers, nonetheless they were included in this wide inclusionary sweep. By so doing, the problems of sexual character evidence were also seen (albeit implicitly) to apply equally in sexual offences involving young complainers. Additionally, the Scottish Law Commission also endorsed the old common law principle that evidence of unchastity cannot be used as evidence of a general propensity to consent and thus, theoretically at least, severed the implied link between unchastity and 'automatic' consent.

On the other hand, relevance is also used as a principle for including evidence. It must be borne in mind that the reformers were also concerned with striking a *balance* between minimising undue questioning of the complainer and allowing all relevant evidence in order for justice to be done to the accused. It is clear from their deliberations that, with regard to the issue of justice being done to the accused, the criterion for admissibility of sexual evidence was to be its *relevance* to issues in the trial. It is also clear that the reformers envisaged that there would be some situations and circumstances in which sexual evidence would be relevant. The Scottish Law Commission followed the format of specifying certain situations wherein sexual evidence would be relevant. These included the situation where the defence was one of 'mistaken belief in consent'. In such a case, if the complainer had a 'bad' sexual reputation and the accused knew of it, then such evidence would be admitted. Also included was the situation where the complainer was a prostitute, evidence of which was seen as relevant and should be admitted in the trial.

They also envisaged that past sexual behaviour between the complainer and the accused would "normally be relevant" evidence unless the past sexual behaviour was a "chance encounter" which took place in the distant past. Although not explicitly articulated, they seemed to

[30] Although, in the end, the legislation did not apply to clandestine injury nor to incest offences

regard recent sexual relations between the complainer and the accused as relevant to the issue of consent.

A further important consideration about the concept of relevance is raised by MacPhail's third ground for prohibiting sexual character evidence, that of the possible danger of conflation. This raised the point that evidence admitted as relevant to credibility, might mistakenly be applied to the issue of consent by the jury. In other words, that evidence of promiscuity may be seen to have more bearing on consent rather than truthfulness. The Scottish Law Commission, whilst at first not explicit about the possibilities of conflation in the same way as MacPhail, referring as they did to the tendency of sexual character evidence to deflect the attention of the jury from the 'proper' issues in the case, later on in the reform process stated that

> "In cases of rape or similar assaults evidence that the complainer was of bad moral character or that she associated with prostitutes should no longer be admitted as being relevant to credibility." [31]

There were other related considerations concerning sexual character evidence that occupied the Scottish Law Commission in relation to sexual character. In the main, these were concerns about the possibility of distinction between sexual character and general 'bad' character in the context of sexual offence trials; discussions concerning the precise wording of the statutory clause to be employed to exclude sexual character evidence, and particularly whether there was to be a general or a specific exclusionary clause.

The Scottish "Shield" Legislation

The balancing aims of the reformers are distinctly visible in the formulation of the legislation. The Scottish legislation takes the form of broad exclusions followed by a series of exceptions (see Appendix II). The exclusionary section bars any evidence that shows or tends to show :

- the complainer is not of good character in relation to sexual matters;
- the complainer is a prostitute or an associate of prostitutes, and;
- any discussion of sexual behaviour not forming part of the subject matter of the charge

It excludes sexual evidence and questioning concerning the complainer and persons other than the accused, and also - and this is something that is not found in other jurisdictions - it

[31] Scottish Law Commission *Consultative Memorandum* No.46

excludes in the first instance any evidence of the complainer's past sexual behaviour with the accused.[32] The exclusion is mandatory and is thus in force unless a formal application is made by the defence to the court to introduce the prohibited evidence under one (or more) of the exceptions. So although the 'shield' legislation specifically excludes certain evidence or questioning nevertheless such evidence is allowed back in under certain exceptions to the general exclusion. The exceptions relate to evidence which :

- explains or rebuts evidence adduced by the Crown
- concerns behaviour taking place on the same occasion as the behaviour in the charge
- is relevant to a defence of incrimination
- is contrary to the interests of justice

The court has the power to limit any questioning by the defence made on application. As Brown et al (1993) point out, this is primarily to control the potential open-endedness of the 'interests of justice' exception.[33]

The Crown is exempt from the prohibitions. The Scottish Law Commission envisaged that the restrictions would not apply to the sorts of evidence that the Crown would introduce in laying out the prosecution case. They did not see that this would conflict with the intention of protecting complainers from unnecessary questioning, since they were of the view that the problems associated with (defence) questioning of past sexual behaviour did not arise in prosecution questioning. There was some opposition to this view, notably from Rape Crisis Centres who felt not only that this would leave the Crown free from control by the Court, but also that the Crown, in practice, did in fact ask distressing questions which caused unnecessary embarrassment. This was backed up by the research findings of Chambers and Millar (1986) who found that prosecution questioning of a complainer occurred quite frequently.[34] They found that the prosecution often focused on the complainer's 'good' sexual character, especially lack of sexual experience. Not only did this set up an equation of lack of sexual experience with 'virtue' which, as a form of stereotyping, was almost as invidious as equating sexual experience with being 'sexually 'loose', but it also set up a situation whereby the prosecution, by introducing 'good' character evidence laid open the complainer to counter attack by the defence.

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[32] The English/Welsh legislation, ss. 2 and 3 of the Sexual Offences (Amendment) Act 1976 excludes only the complainer's sexual behaviour with others

[33] Brown et al (1993) p.45

[34] Chambers, G. & Millar, A (1986) p.137-141, cited in Brown, B. et al (1993) p.45

To sum up, the 'problems' of sexual character evidence then lie primarily in the perceived harmful effects of such evidence in terms of its potential for misrepresentation and distortion, but also, specifically, in its anomalous position in sexual offence trials and in its implications for the questions of credibility and of consent. These were the prejudicial effects that the legislators aimed to curb. Sexual character evidence, then, was to be excluded unless it had genuine relevance to issues in the trial. Even more specifically the legislators aimed to exclude two types of evidential constructions stemming from the use of sexual character evidence. These were a) that the complainer is promiscuous and therefore a liar, and: b) that the complainer consented to sex with A and B and therefore consented to sex with C.

As a result of the reform deliberations, the old common law rules regulating the use of sexual bad character were superseded by the 'shield' legislation, so that, presently, questioning designed to elicit evidence which shows or tends to show that the complainer, is not of good character in relation to sexual matters is specifically excluded (see Appendix I for precise details of the 'shield' legislation). The resultant prohibition on sexual character evidence is a very important prohibition. Not only is it an extremely wide-ranging prohibitionary clause that could potentially cover any sort of evidence which, directly or indirectly, ascribes a dubious sexual character to the complainer but it also, on the face of it, relates quite closely to feminist criticisms of the use of stereotyping in the courtroom. It is not only the ascription of stereotypical characterisations, but the subsequent assassination on the basis of the stereotype that feminist writers have found so objectionable. As will be shown in the following chapters, stereotyping can be done through innuendo and implication just as much as direct statements, and one of the recurring themes under discussion by the legislators concerned the use of sexual character innuendo and inference and, relatedly, the potential for the blurring of non-sexual and sexual character innuendo in sexual offence trials. This aspect of sexual character construction is of some significance and, obviously, very difficult to control within the trial setting. It will be described in more detail later in the thesis (see Chapter Six).

As previously stated, during the reform process, the crime of rape was referred to as throughout as the paradigm instance. There was very little discussion of other types of sexual offences, still less on offences which specifically relate to young victims. Nonetheless the legislation, in its final formulation specifically covered virtually all of the sexual offences (see Appendix II). Whether trials for sexual offences involving young complainers demonstrate the problems that the reformers attributed to rape trials involving

adult complainers and, relatedly, whether the rape paradigm can be extended to those sexual offences is explored in this thesis.

CHAPTER FIVE

THE RESEARCH DATA

This chapter details the numerical findings generated by the main means of data collection, that of court observation. Information about the observed cases - the crimes and offences, verdicts and sentences - is recorded in this chapter, as is some information about the complainer, such as her age and her relationship to the accused.

The Cases

Over a period of three years, 94 sexual offence cases with female complainers aged under 17 years were observed in the Sheriff and High Courts in the central belt of Scotland - specifically in courts in Edinburgh, Glasgow, Stirling, Dundee, and Jedburgh. In the Sheriff Courts, cases were observed which were heard under summary procedure (sheriffs sitting alone) and under solemn procedure (sheriffs sitting with a 15 person jury). In the High Courts, trials were heard by a judge and 15 person jury. The cases are referred to by an identification number (1 to 94) throughout the thesis. Details of each case, giving information on type of court, charge(s), age of complainer, plea, verdict, and sentence, are given in Appendix I.

Contested Trials

Fifty three of the 94 observed cases culminated in a full contested trial where all of the evidence was led and a verdict reached. Thirty trials were heard in the High Court, five were heard in the Sheriff Court under solemn procedure, and 18 were heard in the Sheriff Court under summary procedure. Trials varied substantially in length. Some were heard in one day, others took up to seven days, although the majority were completed within three days.

Twenty three (43%) of the 53 contested trials resulted in the full acquittal of the accused, that is, the accused was acquitted on <u>all</u> of the charges which formed the case. The breakdown of acquittals was as follows:

Table 1. Acquittals in Contested Trials

Not Guilty	**11**
Not Proven	**6**
Other (i.e. case withdrawn, deserted pro loco, no case to answer, acquitted by judge)	**6**
Total	**23**

Thirty (57%) trials involved a guilty verdict. This does not mean however that the accused was found guilty on *all* of the charges which formed the case. Seven of those 30 trials involved multiple charges, and the accused was found guilty on one or more charge, but acquitted on other (often more serious) charges. In ten of the 30 trials where guilty verdicts were returned, it was for reduced, or less serious, charges than the original charges. In two of these trials, the original charges remained, but were subject to deletions in the detail of the offences. In the other eight trials, the original charges were reduced or dropped altogether. For example, in case 1 the original charge was assault with intent to rape, the final charge was indecent assault. In case 37 the original charges were rape and indecent assault. The charge of rape was reduced to one of 'unlawful sex with a girl under 16 years' (s.4 of the Sexual Offences (Scotland) Act 1976) and a guilty verdict returned, and the second charge of indecent assault was dropped. Thus of the 30 trials which involved a guilty verdict, in only 12 instances was there a guilty verdict returned against *all* of the charges in the case. Guilty verdicts in contested trials are thus not as straightforward as they may at first appear.

In the vast majority of contested trials where a guilty verdict was returned, a plea in mitigation was given and a sentencing decision was made there and then. However, there were 4 cases where sentencing was deferred pending further reports (all of these were heard in the Sheriff court).

A custodial sentence was the most common disposal, given in 16 cases, and sentence length ranged from three months to life imprisonment. Monetary penalties were imposed in six cases, (ranging from £50 to £300); one year deferred sentences were given in two cases; and a community service order of 100 hours was imposed in one case. In one case involving three accuseds, two were given a year's probation and the third 50 hours of community service. Full details of sentences can be found in the Case Details at Appendix I.

Guilty Plea Cases

In 41 of the observed cases, the accused(s) pled guilty. For the purposes of this analysis, the term 'guilty plea' is used in a general sense to cover all the various manners in, and stages at, which a plea of guilty was given by the accused. Within this general categorisation there are, however, different types of guilty plea. For example, in two observed cases, the accused pled guilty *during* the trial after a substantial amount of prosecution evidence had been led ("late guilty pleas"). In 30 observed cases the accused pled guilty on the day set for the trial in advance of any evidence being led ("trial day pleas"). Here, the accuseds had initially pled not guilty at the preliminary pleading diet, and hence a date for the trial was set, subsequently there was a change of plea from not guilty to guilty, and the guilty plea was tendered on the day of the trial in advance of it going ahead. Therefore, no evidence was led. It should be noted that, in the vast majority of these guilty plea cases, the accused did one of three things, either

a) where there were multiple charges involved, the accused tendered a 'mixed plea' that is, pled guilty to some of the charges and not guilty to other charges contained in the indictment,

b) where there was a single charge, the accused pled guilty to a lesser charge, or

c) the accused pled guilty to the charge as broadly outlined in the indictment but with (often several and substantial) deletions or alterations to the substance of the charge.

It was very rare for the accused to plead guilty as charged to *all* charges. Moreover, in all observed guilty plea cases, 'mixed' pleas, and charges with alterations and/or deletions were accepted by the prosecution.

The remaining nine guilty plea cases were those where the accused pled guilty at the preliminary pleading diet, and consequently an 'accelerated' hearing date was set on which to decide sentence. These cases are heard under s.102 of the Criminal Procedure (Scotland) Act (called here 's102' cases). Where s.102 cases are heard, the prosecution gives a brief account of the facts of the case, the defence offers a plea in mitigation, and a sentence is given. No evidence is led.

Of the 32 trial day and late guilty plea cases, 29 were heard in the High Court, and six in the Sheriff Court (three under solemn and three under summary procedure). All nine s.102 cases were heard in the High Court.

Table 2 shows the breakdown of type of guilty plea.

Table 2. Types of Guilty Plea

Trial Day Plea	**30**
Late Guilty Plea	**2**
s.102	**9**
Total	**41**

In all types of guilty plea cases, the prosecution gave a summary of the facts of the case, including some details concerning the defendant, and a plea in mitigation was given by the defence. All defendants were legally represented. Sentence was passed in 36 cases, with five sentences deferred pending the receipt of reports. Custodial sentences were given in the vast majority of cases (29). Of those remaining, a fine was given in two cases (£150 and £225); probation orders were given in two cases; a one year deferred sentence in one case and a hospital order in one case.

The Charges

Appendix I sets out exact details of both the initial and final charges involved in each case. It is worth noting here, however, that the charges covered the full range of sexual offences under common law and statutory law. In several cases, there were alternative charges offered in the indictment, see for example, cases 26, 30 and 59 in Appendix I.

Many of the cases involved different types of sexual offences and different numbers of charges. Some cases involve a single sexual charge (or a single sexual charge with a bail contravention charge); others involved seven or eight charges of a sexual nature; still more involved a mixture of sexual and non-sexual charges. It is difficult to represent this amount of diversity and complexity in one table, so this information is broken down into those cases which involve a single sexual offence and those which involve more than one sexual offence and so is contained in two tables. Thirty of the contested trials involved a single sexual charge, and 13 of the guilty plea cases involved a single sexual charge.

Table 3 shows the offences in single sexual charge cases (included in this table are those cases where there was also a charge of contravention of bail in addition to the single sexual offence). Where alternative charges are given, type of offence refers to the first, rather than the alternative charge.

Table 3. Charges in Single Sexual Offence Cases

Offences	Trials	Guilty Pleas	Total
	n.	n.	n.
Rape	10	--	10
Attempted Rape	3	3	6
Indecent Assault	1	1	2
Lewd and Libidinous Practices	7	4	11
Assault With Intent to Rape	2	--	2
s.4 Sexual Offences (S) Act 1976	4	--	4
s.3 Sexual Offences (S) Act 1976	--	1	1
Incest	--	1	1
s.2A Incest & Related Offences Act	--	2	2
s.2C Incest & Related Offences Act	--	1	1
Indecent Behaviour	1	--	1
Indecent Exposure	1	--	1
Breach of Peace (with indecency)	1	--	1
Total	30	13	43

This table shows that the cases demonstrate a wide range of sexual offences, although the majority of single sexual charge cases were rape and lewd and libidinous practices. All single charge rape cases were contested and resulted in a full trial. All accuseds in the single charge incest and incest-related cases pled guilty, and hence no trial took place.

Considerably more contested trials than guilty plea cases involved a single sexual charge, and this will be discussed in more detail later in this chapter under the section *Single and Multiple Charges.*

In 23 of the 53 contested trial cases there was more than one sexual offence charged. Similarly, twenty eight of the guilty plea cases involved more than one sexual charge. The figures in Table 4 relate to numbers of cases. There were a wide spread of different types of sexual offences. Table 4 sets out the numbers of cases which involved one or more of the sexual charges listed under offences For example, 13 contested trial cases involved at least one charge of rape, as did nine guilty plea cases; 10 contested trial cases involved a charge of lewd and libidinous practices and behaviour, as did 18 guilty plea cases. As in the single charge cases, rape and lewd and libidinous practices were the most common charges, occurring, respectively in a total of 22 and 28 multiple charge cases. As in the single charge cases, cases involving incest and incest related offences tended to end up as guilty pleas rather than contested trials.

Table 4. Numbers of Multiple Charge Cases Involving Particular Sexual Offences

Offences	Trials	Guilty Pleas	Total[1]
Rape	13	9	22
Assault With Intent To Rape	3	2	5
Attempted Rape	2	4	6
Threatened Rape	1	--	1
Indecent Assault	5	6	11
Lewd and Libidinous Practices	10	18	28
s.3 Sexual Offences (S) Act	--	8	8
s.4 Sexual Offences (S) Act	1	4	5
s.5 Sexual Offences (S) Act	6	11	17
S.10 Sexual Offences (S) Act	1	--	1
Indecent Exposure	3	1	4
Breach of Peace (with indecency)	1	1	2
Shameless and Indecent Conduct	--	2	2
Incest	1	7	8
s.2A Incest & Related Offences	--	4	4
s.2B Incest & Related Offences	--	1	1
s.2C Incest & Related Offences	--	1	1

Single and Multiple Charges

The vast majority of contested trials (45 of the 53, or 85%) involved a single complainer. Of these, 29 involved a single sexual charge and a single accused (called here 'single complainer, single charge' cases). One other trial involved a single complainer, a single charge, but two accuseds.

In 13 trials involving one single complainer and a single accused, multiple charges of a sexual nature were involved (called here 'single complainer, multiple charge' cases). There were another two cases involving single complainers and multiple charges (cases 35 and 52) where there was more than one accused involved, respectively three accuseds and four accuseds.

There were only 8 contested trials involving more than one complainer and multiple charges (called here 'multiple complainer, multiple charge' cases), that is, 15% of contested trials. Of these, five involved two complainers, two involved two complainers, and one case involved four complainers. All involved a single accused.

[1] This refers to the total number of multiple charge cases involving one or more sexual offences of the type listed in the left hand side of the table.

In the guilty pleas cases, the picture was somewhat different. Twenty seven of the 41 guilty plea cases involved a single complainer. Thirteen of these involved a single complainer and a single charge, and fourteen involved a single complainer and multiple charges. There were however 14 guilty plea cases which involved more than one complainer. These differences between contested trials and guilty plea cases are best displayed in tabulated form.

Table 5 Charges and Complainers in Contested Trials and Guilty Pleas

	Trials	Guilty pleas
Single complainer, single charge	**30 (57%)**	**13 (32%)**
Single complainer, multiple charge	**15 (28%)**	**14 (34%)**
Multiple complainer, multiple charge	**8 (15%)**	**14 (34%)**
Total	**53 (100%)**	**41 (100%)**

From these figures, it appears that the guilty pleas cases that were observed in this study were characterised by multiple charges, that is 68% of guilty plea cases involved multiple charges. Contested trials, on the other hand, appear to be characterised less by multiple charges (43%) and more by single complainers.

Multiple charges, obviously, offer more leeway for pleading guilty to a reduced number of charges. When the actual numbers of multiple complainers and multiple charges are considered, differences between contested trials and guilty plea cases in this regard become more evident. Multiple complainer, multiple charge guilty plea cases involve higher numbers of complainer and more charges than in contested trials, see for example case 54 which involved seven complainers and ten charges; case 71 which involved 13 complainers and 13 charges; and case 78 which involved six complainers and seven charges.

The Complainers

Age

The 94 observed cases involved a total of 133 young female complainers, all under the age of 17 at the time that the case came to court. The issue of the time distance between the alleged sexual incident(s) and when cases actually came to court is fairly complex. In the majority of cases - 51 of the 53 contested trials and 36 of the 41 guilty plea cases - less than a year had elapsed between the alleged sexual incident(s) and the case reaching court. However, in a substantial number of these cases (22) all of which involved multiple sexual

charges, sexual relations between the complainer and accused had taken place over a period of several years. In these cases, sexual relations between the accused and the complainer had commenced three, five, even eight years before coming to light. However the time-lapse between the last sexual incident and the time that the case came to court was approximately one year. The complainer was therefore not much older than she was at the time of the last incident(s). In a smaller number of cases (6) much longer periods (of between two to five years) had elapsed between the last sexual incident and the case coming to court. In such cases, therefore the complainer was considerably older at the time of the trial than she had been at the time of the last incident(s).

The 53 contested trials involved a total of 65 complainers. The age-breakdown of those complainers when the case came to trial was as follows:

Table 6 Ages of complainers at time of contested trial

Years	no	(%)
4 - 6 yrs	3	(4)
7 - 9 yrs	2	(3)
10 - 12 yrs	14	(22)
13 - 15 yrs	26	(40)
16 - 17 yrs	20	(31)
Total	65	(100%)

Nearly three-quarters (71%) were teenagers aged between 13 and 17 years when they gave evidence in court. 22% were aged between 10 years and 13 years. A small percentage (7%) were aged under 9 years old.

In guilty plea cases, complainers are not required to give evidence, although in most cases where a trial-day plea was given, the complainers were present at court awaiting the trial to commence. No complainers were present at the s.102 hearings.

After a plea of guilty from the accused, the prosecution summarises the case, and gives the name, age and address (usually c/o a Police Office) of the complainer(s). This information is also recorded on the indictment. In the 41 guilty plea cases, the ages of the 68 complainers at the time that the case was heard in court were as follows:

Table 7 Ages of complainers at time of guilty plea

Years	no	(%)
0 - 3 yrs	1	(1)
4 - 6 yrs	4	(6)
7 - 9 yrs	9	(13)
10 - 12 yrs	18	(27)
13 - 15 yrs	24	(35)
16 - 17 yrs	12	(18)
Total	68	(100%)

In the guilty pleas cases, just over half (53%) were teenagers aged between 13 years and 17 years. 27% were aged between 10 years and 12 years, and 13% were aged between 7 years and 9 years.

Relationship to Accused

One of the most striking characteristics of cases involving young female complainers is the degree of prior relationship that exists between the complainer and the accused. Indeed, many of the charges involved in such cases point specifically to the degree of relationship. Offences under the Incest and Related Offences (Scotland) Act 1986, for example, presuppose a particular relationship. Specifically, ss 2A, 2B and 2C of the Act refer to relationships of consanguinity and adoption, step-relationships and breaches of authority and trust, respectively.

In an overwhelming majority of cases, the accused was already known to the complainer - and in most cases the accused had been known to the complainer for a long period of time. There were also some cases where the accused could be described as a casual or short-term acquaintance, having been known to the complainer for a short time prior to the incident. A small number of cases involved total strangers - where they did, this was most often in cases of indecent exposure, or breaches of the peace which involved some form of indecency, although some involved charges of rape or attempted rape.

In most cases the relationship between the complainer and the accused was one of blood or affinity, but there were several cases - where the accuseds were neighbours, mother's co-habitees, and friends of the family - which involved relationships of trust and/or authority. The following table shows the relationship between complainers and accuseds in contested trials.

Table 8 Relationship Between Complainer and Accused in Contested Trials

Type of Relationship	No. of Complainers	%
Consanguine (e.g. daughter, grand-daughter, niece, sister)	10	15%
Step Relation (e.g. step-daughter, step-granddaughter)	4	6%
Living in same household (e.g. mother's cohabitee, lodger)	6	9%
Family friend (e.g. baby-sitter, father's workmate)	8	13%
Neighbour	4	6%
Long-term Acquaintance (e.g. friend's uncle, father's employer)	19	29%
Short -term Acquaintance (e.g. met in week preceding incident)	5	8%
Stranger	9	14%
Total	65	100%

Ten (15%) of contested trial cases involved a blood relationship, ten (15%) involved a non-blood relationship, but the complainer and accused were living in the same household (four of these involved step-relations). Taken together, the categories of neighbour and family friend and long-term acquaintance constitute 48% of cases.

As Table 9 shows, (over page) the guilty plea cases were very striking in terms of the closeness of the relationship between the complainer and the accused. There were close blood relationships in 31% of the guilty plea cases, and in an additional 26% of cases, the complainer and accused shared the same household, either as step or foster relations, or where the accused was a lodger or the child's mothers' cohabitee). In 26% of cases the accused was some form of long-term acquaintance of the complainer or the complainer's family. As in the contested trial cases, the accused was a stranger in 8% of cases.

Table 9 Relationship Between Complainer and Accused in Guilty Plea cases

Type of Relationship	No. of Complainers	%
Consanguine (e.g. daughter, grand-daughter, niece, sister)	21	31%
Step Relation (e.g. step-daughter, step-granddaughter)	9	9%
Foster Relation (e.g. foster daughter)	2	3%
Living in same household (e.g. child of cohabitee, lodger)	9	13%
Family friend (e.g. baby-sitter, old friend)	7	10%
Neighbour	4	6%
Long-term Acquaintance (e.g. local bus driver, friend's uncle, community worker,)	7	10%
Short -term Acquaintance (e.g. met in week preceding incident)	4	6%
Stranger	5	8%
Total	68	100%

Analysis of the empirical observation data tentatively suggests certain differences between contested trials and guilty plea cases. The research documents a fairly high rate of guilty pleas made in advance of a trial. One may speculate on the basis of the data assembled here that, by and large, 'guilty plea' cases share some common characteristics. In general, whilst contested trials appear to be characterised by single, mainly teenage, complainers, guilty plea cases appear to be characterised by multiple charges which often involve multiple complainers who tend to be younger in age than those in the contested trials. This tends to suggest that cases involving several complainers are more likely to involve a guilty plea. There may be a number of reasons for this, other than the most obvious that the accused decides to admit his guilt. The scope for a mixed plea (guilty to some charges, not guilty to others) is obviously far greater in these cases than in those involving a single complainer, single charge. Hence the accused may plead guilty to some and not to others in the hope of a lesser sentence overall. It may be that the potential for corroboration is enhanced in cases involving several complainers, given that Scotland adheres to the Moorov doctrine whereby evidence of similar fact can provide corroboration. It may be that, faced with the prospect of evidence emanating from several sources, the accused decides to plead guilty. There are other, social (and family) pressures on those accused of sexual offences with children (particularly if there is a blood relationship) to plead guilty, and thus 'spare the child' the

ordeal of giving evidence in court. It may be that these pressures prevail (if one recalls also that many of these cases involved fairly young children), and the accused pleads guilty.

One may also speculate about the reasons for the finding that contested trials tend to involve single complainers, again apart from the obvious one that the accused is innocent and wishes to prove a false allegation. Obviously, the potential for corroborating evidence is diminished where there is only one complainer. These cases also tend to involve older teenage complainers. It may be that the accused decides (or is advised) to take his chance in court in the hope that the complainer will crumble in the witness box or be vulnerable to attacks as to her credibility.

Both contested and guilty plea cases are characterised by close and long-term prior relationships between the complainer and the accused. That the majority of sexual offenecs take place between those who are known to each other rather than between strangers has been repeatedly documented by other research. However, it was also the case in this particular research that there are a higher percentage of consanguine relationships in the guilty plea cases. Similarly, a much higher percentage of guilty plea cases contained incest and incest-related offences than contested trials. Again, one may speculate that family pressures and dynamics may mean that the accused is more likely to plead guilty where there is a very close relationship, than in those cases where there is not. Of course, the sample is relatively small and accused's were not interviewed as to their motivation for pleading guilty or not guilty. As such all of this is tentative speculation, and further research is needed in this area.

CHAPTER SIX

THE CONSTRUCTION OF SEXUAL CHARACTER

As outlined in the Introduction, a main concern of this thesis is with the ways in which evidence about the young complainer - in particular information about her sexuality - is elicited and deployed in the court room, and the way that it is used in the construction of sexual character. This is the focus of this chapter. Using data from the observation of trials, it will be argued that in most sexual offence trials, a number of active and quite specific processes take place throughout the trial which, cumulatively, feed into and inform the construction of a 'sexual character' which can be attributed to the young female complainer. It was also stated in the Introduction that sexual character is the conduit through which stereotypical images of young female sexuality are channelled and applied in the court room. The process by which this takes place will be described here. By examining the process of character construction, what goes on in the trial can be explicated, however it is important to state that this should not be construed as giving a justification for the application of stereotypical images of female sexuality in the court room. Rather, what is interesting is the process by which such stereotypical images become installed and embedded in court room practice.

Ascribing a sexual character to the complainer seems to be a crucial component of the defence argument, in a sense regardless of the form(s) that the defence argument might take during the trial. Whether the defence aim appears to be merely to undermine or cast doubt on the prosecution case or, more actively, to try to show that the complainer fabricated, imagined or consented to the sex, this is commonly accompanied by attempts by the defence to show sexual character. Additionally, and of central relevance to this discussion, the first of the general exclusions put into place by the Scottish 'shield' legislation states that the court is not to admit or allow questioning designed to elicit evidence which shows or tends to show that the complainer "is not of good character in relation to sexual matters."[1] Yet despite the restrictions set up by the legislation on the use of such evidence, sexual character construction does continue to go on in Scottish sexual offence trials, largely with the effects that the legislation aimed to prevent.[2] Whilst blatant character attacks are relatively rare,[3] court room observation indicates that sexual character evidence

[1] s 141A (1) (a). Unless there is an application to introduce such evidence on the grounds that a) it is designed to explain or rebut evidence adduced or to be adduced otherwise by or on behalf of the accused; or b) it relates to sexual behaviour which took place on the same occasion as the alleged offence, or is relevant to incrimination, or c) its exclusion would be contrary to the interests of justice

[2] see Brown, B. et al (1993) *Sex Crimes on Trial* especially chapter 12 for an analysis of the effectiveness of the 'shield' legislation

[3] see Brown et al (1993) chapters six and seven for a breakdown of the use of applications under the exception clauses of the legislation to introduce sexual character evidence

does in fact persist across *all* types of sexual offence trials under both solemn and summary jurisdiction and is not restricted to trials for rape or rape-related offences. It is also, and this is the main concern of this chapter, a strong feature of sexual offence trials involving young complainers. Here again it is not restricted to rape trials, but is also found in trials for statutory sexual offences.

Before embarking on a fuller discussion of the research findings, it is important to emphasise the multifunctionality of evidence, that is, that evidence in a trial can be applied to more than one issue. This is particularly pertinent here because, whilst the aim of the rest of this chapter is to try to show how *sexual character* is constructed, I will be drawing on evidence that, in addition to suggesting or conveying sexual character, may also have been introduced in the trial situation by the defence for another specific purpose, for example, in relation to a particular issue such as consent, or to test credibility or reliability. Evidence is used in a number of ways throughout the trial, so whilst a particular piece of evidence may be specifically and explicitly used to address an issue such as the complainer's sexual behaviour with someone other than the accused, it also has implicit connotations and resonances for the construction of her sexual character.

Ascribing Character

This chapter describes in some detail the main processes which contribute to the construction of 'sexual character' in trials involving young female complainers. In so doing, it traces the ways in which character is *built up* and is developed during the trial by, amongst other things, the *eliciting* of evidence, the *interpretation* of that evidence and, crucially, the deployment of forceful and evocative *images* of the young female complainer which are used to suggest and convey sexual character. It also describes the relationship between the imputation of sexual character and credibility and, to a lesser extent, its relationship to consent. Predisposition towards consent is implied by the defence in a number of ways throughout the trial, and the dynamics involved in the specific construction of the consenting complainer are dealt with in fuller detail in the following chapter.

An important preliminary point to be made in advance of this discussion, and one which will be returned to periodically throughout the subsequent sections, is that the construction of a sexual character for a girl or young women does proceed very much along the same lines as does the construction of sexual character for adult women, and the basic polarities of 'good' and 'bad' which underpin the depiction of adult women as someone who is promiscuous, indiscriminate and likely to consent are also present. However, there are some important variations in that what is played up by the defence in such constructions is not so much 'bad' sexual character, but *sexual character* in itself. It appears that any

evidence of a sexual character, in a sense irrespective of whether it is "bad' sexual character is sought by the defence. For young women and girls, to have a sexual character at all, to be shown to be a 'sexual being' is the potentially damning equivalent - in defence terms at least - of 'bad' sexual character for an adult women. The aim of sexual character formulation - with it's 'bad' girl moral undertones, appears to be the presentation of the complainer as someone who is *likely to consent,* the juvenile corollary of the consenting adult complainer.

Connotation and Inference

As well as being specifically addressed through the use of evidence which is directly sexual in nature, such as evidence of promiscuity, or loose morals, sexual character can also be connoted through evidence that, in itself, is not overtly sexual. For example, sexual character can be conjured through references to the complainer's general lifestyle, her choice of friends, or her preferred leisure activities. Whilst not directly sexual in themselves - indeed at first seemingly innocuous - such topics are given sexual connotations in the context of the trial. Repeated reference to such information throughout the trial and in conjunction with more explicitly sexual evidence can effectively result in the building up a picture of the complainer's sexual character. Indeed, this particular problem of non-sexual evidence being used to connote sexual character was cited explicitly in the Parliamentary Committee debates which preceded the formulation of the 'shield' legislation, as the following quotation demonstrates:

> "In cities such as Glasgow, Dundee or Edinburgh, it is not difficult to envisage situations where the line of evidence may be, 'Were you at such-and-such public house ? Were you there on your own ? Were you there at 11.30 at night? " My hon. and learned friend ..... could doubtless continue a skilful line of questioning without mentioning the word 'sex' for a considerable time, but his questions would clearly hint that the girl had loose morals and went out late at night into dives of low character. The implication to the jury might be that if someone carried on in such a way she might be prepared to engage in sexual intercourse. The chain of questioning might establish that there had been consent on her part."[4]

Connoting character may involve asking questions which carry certain character implications, e.g. questions about lifestyle as in the above quote, but also through the *inferences* that can be drawn from such information. As Brown et al (1993) found in the case of adult complainers, quite specific inferences can be drawn from questions concerning marital status, particularly if juxtaposed with questions concerning numbers of children. The current research found that, in the case of younger complainers, information concerning contraception and of course, virginity, can have a similar effect. Similarly, questions concerning dates of past pregnancy and/or abortions which may not be directly

[4] Parliamentary Committee debate quoted in Hansard, Col 878, 26 March 1985. Statement made by Peter Fraser, then Solicitor-General for Scotland

sexual in themselves, but the inferences that can be drawn - particularly if the complainer is young - can be potentially damaging in terms of her character. During the court observation of trials, involving young complainers, it appeared as if the defence was eliciting lifestyle information solely in order to get at the latent meaning implicit within such evidence and so draw out it's character implications. Very often there is no evidential justification by the defence for this sort of line of questioning. It is the connotation of sexual character through implication, inference, innuendo and subtle suggestion that is so very difficult to control. In addition to this sort of connotation, there are the allusions and innuendoes drawn by the defence (and also by other witnesses called to give evidence). These are quite difficult to represent in a written form as often, whilst the question itself may appear innocuous, the suggestion or implication is made by gesture or tone of voice. At times, 'character-loaded' questions may be put rhetorically by the defence, yet at others a question may not be put to a witness at all, but the suggestion or implication is made by the defence in the form of an aside to the jury, or stated during the defence summing up. At the level of due process, the use of suggestion and innuendo by the defence to denote character is one way of avoiding gross character attacks which would probably rebound back on the defence, because under the rules of evidence, if an accused (via the defence) were to cast aspersions on the character of a prosecution witness, it would then expose him to cross-examination of his own character by the prosecution.

The Use Of Sexual Stereotypes

The most pervasive - and seemingly effective - way of developing and then ascribing character in sexual offence trials is through the accumulation of evidence drawn from a number of different sources. Such evidence can be elicited, not only from the complainer herself, but from a range of other sources that can be drawn on in the trial. For example, evidence that, directly or indirectly, has implications for sexual character can be elicited from other witnesses in the trial; it can also be drawn from a wide range of physical evidence, such as forensic evidence which suggests sexual activity with someone other than the accused or, equally, from the production of the clothing worn by the complainer, and; as clearly documented by Brown et al (1993), from information concerning gynaecological and medical history - such as past pregnancies and/or abortions or contraceptive practices - all of which may be gleaned from the medical report submitted routinely as part of the Crown productions.[5]

Taken together, verbal testimony from different witnesses, physical and/or forensic evidence, and the inferences that can be drawn from such evidence have a cumulative effect, so that constantly throughout the trial a picture is being built up of the complainer,

[5] Brown, B. et al (1993) p.77

a picture which shows the type of girl she is; the type of background she hails from; the types of friends she associates with; the type of lifestyle she leads. Evidence from a variety of sources is woven by the defence into a picture of a particular type of girl - who can be summed up as '*that* kind of a girl' - which denotes someone who is the type of girl who demonstrates some interest in sex, the type of girl who is likely to experiment with sex, and who is the type of girl who is also likely to lie about such matters. This last typification occurs due to the seeming ease with which sexual character can be linked with the qualities of untrustworthiness, untruthfulness and unreliability (a variation of the 'unchaste = liar' equation despite the preventive efforts of the legislation). Once it is suggested that the complainer possesses a sexual character, it seems to follow that she is intrinsically of dubious character in the more general sense.

But these typifications are not always the end of the story. Character construction is more complex than merely suggesting to the judge and jury that the complainer is a certain *type* of girl. The construction of sexual character is invidious in that it also draws heavily on certain stereotypical notions of female sexuality, and in particular those stereotypes which depict young women and girls as sexually immoral, seductive, promiscuous, untrustworthy, provocative, and thus somehow sexually dangerous. Clearly, such stereotypes are largely synonymous with dubious (if not at times outright 'bad' sexual character) and therein lies their prime significance. As will be shown in this chapter, such stereotypes are introduced into the court room through the use of innuendo, suggestion, implication and inference as well as through the use of direct statements from particular witnesses. Stereotypes of young female sexuality are drawn upon and simultaneously strengthened through the accumulation of both sexual and non-sexual evidence.

However, what adds to the complexity of this schema of the stereotype is that, counterposed with the image of the sexual being is the opposing image of the asexual being - the posited 'ideal' image of young femaleness which denotes sexual innocence and purity - which is not only equally stereotypical and equally invidious, but which also sets up a standard against which the *sexual* complainer can be measured - and always found wanting. This stereotype of the 'ideal' young female sexuality denotes someone who is sexually inexperienced, innocent, untarnished, respectable. It is this quality of innocence which requires to be protected, this sexual inexperience which is the grave object of concern, this vulnerability to seduction which formed the rationale upon which the state controls on sex were formulated. Sometimes the stereotypical 'ideal' is referred to explicitly in the trial; it is also sometimes evoked through the (often misguided) use of 'good' character evidence by the prosecution - but more frequently it is implicitly present in the allegories of the ('bad') sexual stereotype. Resonating through these stereotypes are the

twin discourses of threat and innocence. The threads of sexual character are thus woven, with reference to these two opposing stereotypes and conveyed through the use of images, throughout the trial. Each evidential theme that emerges is subsequently tied in to a stereotypical image (sometimes several images) of young female sexuality, and thus the layers of sexual character are built up.

Of course, the 'ideal' image of female sexuality also constitutes the 'ideal' victim in criminal trials, yet another problem that feminists have pointed to in relation to the use of stereotypes. The use of such 'ideal' stereotypes as the standard against which all are measured is dangerous precisely because it can be used to construct a hierarchy or 'real' and 'not real' rape[6] whereby only those complainers which 'fit' the schema of the ideal rape typology are taken seriously and treated as having suffered harm.

Images and Their Deployment

What is so striking about the stereotypical images of young complainers which are used so distinctively in the courtroom is that they appear to be underpinned by particular conceptions of young female sexuality, which seem to have remained largely unchanged since the end of the 19th century. The twin discourses of vulnerability and danger which informed conceptions of young female sexuality in the 19th century, and which so characterised the debates and discussions preceding the passage of the Criminal Law Amendment Act in 1885,[7] are frequently present in the images of young female complainers evoked in the contemporary court room.

The images of young complainers, whilst providing a foundation upon which the construction of sexual character can take place, also bear a complex relationship to the rationales of protection and competence which underlie notions of non-consent. The vocabulary used to describe the complainers in sexual offence trials, and the language which is used to invoke the stereotypical images essentially divides girls and young women into the 'good' and the 'bad' - the promiscuous and the pure, the sexually dangerous and the sexually innocent. They are described and discussed in terms of their sexual knowledge, their sexual reputation, their sexual experience - or lack of it. The sexually aware girl or young women is depicted as dangerous, sexually potent, whilst the accused may often be depicted as suffering the consequences of these uncontainable female passions. Present also are tensions and contradictions which relate to the notions of the 'passivity' and activity' of girls and young women, particularly in relation to their role in initiating and

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[6] see Estrich, S. *Real Rape* (1987)

[7] The 1885 Act created a series of age-related sexual offences where the complainer was under a certain age, and ultimately led to the raising of the female age of consent to 16 years (see chapters one and two of this thesis)

sustaining sexual relations. The ideal of innate asexuality and the need for enhanced protection is at odds with the images of sexually active and provocative young girls who have moved beyond the protective folds. Young girls are subject to fairly similar stereotypical sexual myths as are adult women, in that within the context of the sexual offence trial, they are invariably portrayed as seductive temptresses, as loose and sexually indiscriminate, but at the same time young girls are seen as 'easy to get and sexual prey'.

It is important to note that the images that are conjured up and deployed by the defence in the construction of sexual character are not wholly exclusive of each other, and several images can often be identified in the same trial context. This is partially due to the multiplicity of uses that evidence can be put to by the defence, but also due to the degree of overlap between these stereotypical images. Very often they feed off and inform each other. The links between the images are many and varied. For example, where the image conjured is one of a sexually active, experienced, provocative and precocious complainer, the spring board is set up to allow an almost effortless jump to the image (or secondary characterisation) of the untrustworthy, deceptive or vindictive complainer.

The following sections describe, by means of examples drawn from the observed trials, the main ways in which sexual character is built up and the images that are evoked thorough direct questioning, suggestion and inference.

The Complainer as Sexually Knowledgeable

The most important (and direct) source of character evidence is the complainer herself. Evidence will be drawn from her directly through questioning on her lifestyle, sexual knowledge and sexual experience, but also additionally through connotation and implication. Sexual offence trials by their very nature offer a good deal of leeway for the construction of sexual character, as much of the material discussed is overtly and explicitly sexual. This is particularly the case during the complainer's testimony, where she will be required to describe in great detail the sexual minutiae of what took place. This in itself offers all sorts of scope for the pursuit of character evidence. However, even when evidence is not explicitly sexual in itself, it becomes so in the process of telling the story of the sexual assault. Smart (1989; 1995) describes the rape trial as

> "a specific mode of sexualisation of a woman's body ... Her body becomes literally saturated with sex. She is required to speak sex, and figuratively to re-enact sex; her body and its responses become the stuff of evidence."[8]

[8] Smart, C. (1995) *Law, Crime and Sexuality : Essays in Feminism* p.83-84

Evidence becomes 'sexualised' in the context of the court proceedings. This appears to be no different when young complainers are involved, although the focus of evidence and the ways in which it is sexually imbued may be different. For example, in the case of younger complainers, there is much more emphasis placed on establishing sexual awareness, than there is in cases involving older women. Establishing the extent of the young complainer's sexual knowledge, usually done in terms of her understanding of biology and/or physiology and sexual terminology is almost routine. The prosecution, particularly in the case of a very young complainer, will frequently try to establish whether she uses any particular words to describe parts of the body or particular aspects of sexual behaviour. This is done, presumably, as a means to try to ensure the clarity of her account and to circumvent possible ambiguity in the minds of those present. In the case of older girls, the prosecution questions are more specific, and preface particular discussions, for example, "Do you know what masturbation is ?" (case 25); "Do you know what a condom is ?" (case 15). In cross-examination, this is often taken further by the defence, and her knowledge of sexual terms and practices is used to suggest sexual character.

Several cases demonstrated attempts by the defence to ascertain the extent of the complainer's understanding of sexual terminology, in particular what one defence referred to as "playground sexual slang".[9] Where a young complainer demonstrates an understanding of specific sexual terms or has a knowledge of sex, then this is used to substantiate the defence construction of her sexual character in particular ways. This sort of extrapolation is fairly common, particularly in cases involving adolescent girls. For example, in one case involving several charges of lewd and libidinous practices, the defence was concerned to show that the complainer was, amongst other things, sexually aware and this was evidenced by her full understanding of, and interest in, sexual talk. Much of his cross-examination focused on "the school playground talk of sex" and he suggested repeatedly that because she had "spoken with friends in school" then, by extension, she "must be interested in sex" (case 2). In a similar vein in case 8 which involved a 5 year old and an 11 year old complainer, these questions were asked of the 11 year old

Defence: Do you know the facts of life ?
Complainer: Pardon
Defence: Do you know how babies are made ?
Complainer: Yes
Defence: You knew this before [accused] came to stay ?
Complainer: Yes
Defence: Who told you ?
Complainer: My friends at school
Defence: Do you talk about sex a lot at school ?
Complainer: Not really
Defence: Do you talk about boyfriends ?

[9] This is glaringly at odds with feminist notions of 'empowering' young girls through teaching them about sex and sexual terms and thus raising their awareness of sex and their own sexuality

Complainer: Sometimes
Defence: Has anything like this happened to any of your friends ?
Complainer: No
Defence: Do you watch TV ?
Complainer: Yes
Defence: Videos ?
Complainer: No

The defence then went on to ask the complainer what sort of television programmes she liked, and specifically focused on programmes and films about young love affairs. He also asked whether she had seen a rape scene in a soap opera that had recently been shown. The questions were quite detailed, focusing on how much time the complainers' spent talking about sex with their friends and what exactly they spoke about and whether they ever "shared confidences". This kind of equation between talking about sex and being interested in sex was fairly common, and sometimes the link between *being interested* and actually *having sex* is made quite explicitly by the defence.

The complainer's description of the sexual event(s) that allegedly took place will frequently prompt questions by the defence designed to test the extent of her knowledge of sexual terms. This overt preoccupation with the complainer's sexual knowledge is quite curious - in many ways the information that a young girl is sexually aware is presented by the defence in a way that suggests she has somehow acquired illegitimate knowledge, that she has gained insight into something which is forbidden to her, that in some way she has broken the rules. Her broaching of the subject which is forbidden thus reveals something essential about her character, her social identity. Moreover, in some cases, evidence that the complainer possessed some sexual knowledge was used to suggest that she was making it all up. In these cases, the suggestion was that she used her sexual knowledge to construct the allegation. Whatever the defence version, it is clear that the complainer's sexual knowledge is used to cast her in a dubious light, and this image of the *sexually aware* complainer is often a first significant step in the construction of sexual character.

But implanting the image of the *sexually aware* child does not always work. In the following case involving a 9 year old girl and a charge of assault with intent to ravish, the defence attempt to show that the complainer had some sexual knowledge seemed to backfire somewhat when she insisted she did not understand. His switch to questions implying dubious general character was remarkably swift .

Defence: Do you know how babies are made ?
Complainer: No
Defence: Did you tell [Doctor and WPC] you knew how babies are made ?
Complainer: No
Defence: Do you know what having periods means ?
Complainer: No
Defence: I want to put it to you that this incident didn't happen. Did you ever play truant from

school ?
(case 1)

Awakening Sexuality

Young female complainers - especially adolescent teenagers - are typically presented in a rather curious way by the defence, a way that is informed by a particular ideology of female sexuality. Complainers are commonly described as "sexually provocative" , "precocious", "flirtatious" and, in one particularly memorable case involving a very young girl of 5 years old as "seductive." Obviously, such typifications carry with them fairly explicit sexual character connotations. In most of the observed cases, these typifications were brought to life in the trial through the deployment of certain images of young women and girls that correspond to a rather spurious, yet curiously unimaginative set of ideas that seem intimately intertwined with conceptions of female sexuality.

Underpinning and strengthening such characterisations seems to be the implicit idea that adolescence is a time of awakening or emergent sexuality which manifests itself in "sexual curiosity" . The image of the *sexual adventurer* can be summed up fairly succinctly in statements made by the defence to the jury in two separate cases. In the first, the complainer is depicted as initiating the sexual activity because her "burgeoning sexuality drives her to experiment in sex" (case 22); in the second case the sexual activity is explained as "the result of sexual exploration initiated by the complainer in order to satisfy her sexual curiosities" (case 27). In both of these cases, the complainers have not only been attributed with initiating the sexual activity, but their uncontrollably blossoming sexuality has propelled them into it. These examples are not unusual. The Lolita-like image of awakening sexuality was frequently drawn upon, not only in the contested trial cases, but also as part of the pleas in mitigation in those cases where a guilty plea was tendered by the accused (these are discussed more fully in Chapter Eight).

In cases involving adolescent girls there are often marked attempts to typify the complainer as provocative or precocious and the sign posts are easy to follow. In case 2 one particular line of questioning was relentlessly pursued in the cross-examination of the complainer and other witnesses in the trials. This was to suggest that the 13 year old complainer was particularly flirtatious and precocious and had a history of being so since her earliest childhood (the 'lewd and libidinous' incidents which were the subject of the charge allegedly took place several years previously when the complainer was between 8 and 9 years old). It was alleged by the defence that the sexual activity had been initiated by her in order to satisfy her "avid sexual curiosity". The accused was a young man of low intelligence and it was suggested that she had taken advantage of this. Further, it was also suggested that she had always preferred the company of men to that of women, and that she had

developed and maintained an overtly sexual pattern of behaviour towards men. This "direct action" included "going up to men, sitting on their knees, and ruffling their hair". The mother of this child was questioned about her daughter's hobbies and interests and she replied that they included pop records and pop bands as well as clothes and makeup and that latterly, she had shown an interest in boys. This last point was picked up by the defence in his summing up of the case to the jury as "an unnatural interest in boys for one so young - an obsession in fact" . Her "unnatural curiosity" about sexual matters was, according to the defence, a result of her overhearing sexual talk in the school playground. The image of the *seductive child* was especially strongly conveyed in this particular case. But it is not an uncommon depiction, neither is it an extreme example. In a further three contested trials (cases 11, 29, 38) the depictions of the complainers were just as explicit. In these cases, the main defence line was that the complainer's had initiated the sexual activity with unsuspecting accuseds.

Implicit in the image of the *seductive child* is the idea that the child is somehow to blame for the sexual behaviour. This is not new. Feminist analyses of incest have traced the many ways in which the abused child is held responsible for the sexual behaviour.[10] One of the most pervasive of the ways in which responsibility is ascribed is through the attribution of sexual precocity or forwardness on the part of the girl. Often these views stem from 'expert' opinion issued on such matters. One of the more authoritative statements concerning the sexual precocity of young girls in relation to child sexual abuse and which still seems to hold sway in some court rooms today was made by two American psychiatrists in the 1930's:

> "These children undoubtedly do not deserve completely the cloak of innocence with which they have been endowed by moralists, social reformers, and legislators. The history of the relationship in our cases usually suggests at least some co-operation of the child in the activity, and in some cases the child assumed an active role in initiating the relationship ... It is true that the child often rationalised with excuses of fear of physical harm or the enticement of gifts, but these were obviously secondary reasons. Even in the cases where physical force may have been applied by the adults, this did not wholly account for the frequent repetition of the practice. Finally, a most striking feature was that these children were distinguished as unusually charming and attractive in their outward personalities. Thus it was not remarkable that frequently we considered the possibility that the child might have been the actual seducer, rather than the one innocently seduced." [11]

The appeal to an image of the girl as seductive is a common device in the defence repertoire. It often works. There appears to be widespread belief in the 'Lolita syndrome" as perhaps evidenced by a recent pronouncement made by Judge Ina Starforth Hill when

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[10] See for example, Ward, E. (1984) *Father -Daughter Rape* and Bell, V. (1993) *Interrogating Incest*

[11] Bender, L. and Blau, A. (1937) 'The Reaction of Children to Sexual Relations with Adults' American Journal of Orthopsychiatry vol. 7 (quoted in Ward, E. *Father-Daughter Rape* (1984) p139)

awarding a sentence of 2 years probation to a man who pled guilty to attempted intercourse with an 8 year old:

> "The law in this country protects little girls because they do not know right from wrong and if invited to commit a sexual offence they would go along with it because they thought it was right. Little girls are not there for you to indulge your sexual activities. However I have been provided with information that leads me to think she was not entirely an angel herself. "[12]

This quote also neatly encapsulates the dualistic notion of young female sexuality referred to in Chapter One. In the first two sentences, the Judge is articulating the protectionist argument, and in the third sentence, refers to the girls' past sexual behaviour which, presumably is the justification for the light sentence.

The notion of young girls' awakening sexuality is also strongly associated with young girls' sexual fantasising. The *sexual fantasiser* is a not uncommon image put forward by the defence. In defence rhetoric, newly awakened sexuality not only manifests itself in 'sexual curiosity' but also gives rise to 'adolescent fantasy' which is usually romantic or erotic in nature. There are a number of variations on this theme, but basically they all seem to follow a similar format. That is, that the sex was a culmination of fantasy, or the sex with the accused was a substitute for fantasy sex with a pop star or actor. Four cases actually involved this type of suggestion, frequently pursued through questioning the complainer (and other witnesses) about her predilections for reading teenage magazines, or romantic literature, or supposed infatuations with actors or pop stars. Consider the spuriousness of the following example drawn from one of these cases:

Defence: Is it not the case that you have posters of [popstars] up in your bedroom ?
Defence: Did you not say that you fancied [a pop star] and would love to winch [kiss] him ?
Defence: Did you not say that [the accused] looked like [the popstar] and that you fancied him rotten ?
Defence: I want to put it to you that you played out these fantasies with [the accused].

Another common theme put forward by the defence is that the sex did not take place at all, but was fantasised or imagined. In this type of case, in addition to suggesting that the sexual activity took place as a result of sexual curiosity it is also suggested that the sexual activity did not take place, but rather the accusation was a result of sexual fantasising on the part of the complainer. The fielding of several different lines of defence is common (even if they are inherently contradictory) as, after all, the defence has to do no more than 'put' alternative suggestions/interpretations to the complainer. Of course, the image of the *sexual fantasiser*, especially the version which suggests that the sexual activity was entirely fictitious, is often used in conjunction with the image of the *lying* young complainer. Here what is being evoked is a stereotypical image of the girl or young

[12] The Times 9.6.1993

women as being inherently untrustworthy when it comes to sexual matters. It comes closest to the phenomenon of the complainer as 'unchaste liar' which is so condemned under the legislation and invokes the equation lack of virtue = lack of veracity. Of all the images it is perhaps the most pernicious in that it can have severe repercussions on the complainer's credibility in the trial. It was also something which the Scottish legislators wanted to outlaw (see Chapter Four for a discussion of sexual character and its implications for credibility). The theme of the lying complainer is very common (and is frequently raised in relation to her reliability) but the lying complainer also has a number of variations, such as the *vindictive liar* and the *frightened liar.* These are also often used to suggest specific motives for false allegation. The image of the *vindictive liar* is used to suggest someone who lies out of pure maliciousness in order to 'get at' the accused in some unspecified way. This is very like the evocation of the malicious woman who makes a 'revenge' allegation in rape trials. In one case (of rape involving a 14 year old girl) the defence presented the complainer as someone who made the allegation against the accused some time after the incident took place because she was angry and upset with him because he had not contacted her following their "sexual romp" (case 36).

The depiction of the complainer as *frightened liar* was produced by the defence in a small number of cases. In this type of construction, the defence line is usually that the complainer consented to the sexual activity with the accused, but then panicked afterwards, either because she thought she would get into trouble with her parents for being late home; or she would not be able to explain her muddy and torn clothes; or she thought she might be pregnant. Both images, of the *vindictive liar* and the *frightened liar*, draw on the stereotype of young girls as deceptive and secretive, and prone to making up stories. But in defence rhetoric the girls and young women in these cases step beyond the stereotypical depiction of girlish untruthfulness - they are also *dangerously* untruthful in that their lying causes harm and suffering to others.

Appearance and Demeanour

Sexual character is not only invoked through direct questioning of the complainer's sexual knowledge and the imputation of sexual awakening. In the trial, the defence will commonly try to use the *appearance* or demeanour of a young girl as an opportunity or means to demonstrate her sexuality - or indeed her potential sexuality - typically building towards the ascription of sexual character. Interestingly, it is not only the complainer's appearance, dress and demeanour at the time of the offence that is used by the defence to suggest sexual character, but also her appearance and manner in the witness box.

The construction of the provocative, sexual, and likely-to-be-consenting young complainer is often begun by reference to her outward appearance - the extent of her physical

development, the way she was dressed at the time of the offence, her use of make-up, her type of hairstyle and any personal habits such as smoking or, even, gum-chewing.

The extent of her physical development - whether she is tall or small, has begun to take on a 'womanly' shape, even whether she wears a bra, are often the subject of discussion. Consider the following examples which illustrate this focus on physical development : "She has advanced physical development and is sexually mature for her age" (case 3); "She is remarkably fully developed" (case 42); "She appears much older than her years" (case 52). These examples also offers clues as to the use which the defence hopes this sort of evidence will be put in the minds of the jury. Physical development is equated with sexual maturity; someone who looks older will be likely to act older. It is easier to attribute a sexual character to someone who looks old enough to have one. It is however important to note again that evidence can be put to a number of different uses by the defence during the course of the trial, and that it is common for the defence to deploy more than one argument to combat the prosecution case. The emphasis on physical development may be used as a step in the construction of sexual character, but it may also, for example, be an attempt to substantiate the accused's belief in the age of the complainer (the issue of 'mistaken belief in age' will be discussed in more detail later in this chapter).

Defence allegations that the complainer made deliberate attempts to make herself appear older than she really is (either on the occasion of the alleged assault or just in general) are also fairly common, for example, "Were you not wearing make-up, lipstick and eyes, and wearing high-heeled shoes ?" "You put on high-heels to go to the pictures ?" and "You were dressed up to look much older than 15 years" (case 52). Similarly a 14 year old complainer was cross-examined in some detail on her "modern dress" and her "use of make-up" which, the defence alleged, she used to "create the impression of being older" (case 3). There was no issue raised of mistaken belief in age in either of these cases.

The complainer's clothing, particularly if it could be described as provocative (and sometimes when it could not even by any stretch of the imagination) is used as a building block in the construction of sexual character. Repeated reference to clothing, both underwear and outerwear, and to shoes and makeup, in some cases was made at every opportunity throughout the trial. It is as if the defence, by repeatedly referring to the complainer's "lacy panties" or her "skimpy top" or her "low backed dress" or her "high-heeled shoes" is trying to press home a caricatured image of the complainer as a sexual being, and one who is showing her willingness to consent through her symbolic appearance. Again, this focus on dress, which takes on sexual character connotations throughout the trial, is a common defence tactic in rape cases involving adult women.

As well as referring to her appearance on the occasion of the offence, defence may often allude to the way that the complainer acts in the witness box and how she addresses herself to questions - has she a confident manner ? what is her attitude to the courtroom situation ? is she crying ? does she appear upset ? how does she deliver her answers ? In case 19 for example, the 16 year old complainer's demeanour in court was construed as evidence of her character, when the defence remarked to the jury that she had a "brazen attitude". Her demeanour was also used to suggest that she had not in fact been raped, as she was "too cool". In other words, she did not display the 'correct' symptoms of someone alleging rape.

Lifestyle

The use of non-sexual signifiers conveying sexual character was typically most prolific when referring to the complainer's general lifestyle. Lifestyle evidence can be wide-ranging, although in cases involving young complainers, the most commonly observed were general references to lifestyle and personal habits, such as whether she drinks or smokes, whether she swears, what sort of friends she associates with, what sort of leisure interests she has, and often, crucially, whether she has or has had a boyfriend. This sort of lifestyle information is used to augment the building of quite personal biographies of the complainers, developing her character, revealing aspects of her personality and making her somehow more 'real' to the jury. For example, if the young complainer does drink, smoke or swear, this has obvious character connotations and is played up by the defence not only to show that she indulges in 'bad' or questionable habits, but also to emphasise that she has adopted 'adult" habits. Evidence concerning drinking habits are especially important as this is often used to suggest her evidence may be unreliable due to drink. Such lifestyle evidence is referred to at different junctures throughout the trial, sometimes with great effect. In case 5, which involved a charge of rape of a 17 year old young woman, the defence repeatedly referred to the amount of drink that she had allegedly consumed prior to the assault. Whilst on the one hand this had implications for the reliability of her recall of events (and this use of evidence will be picked up again in the following chapter), the drink issue was also important in terms of the construction of sexual character. The defence was concerned to show that she frequently drank a lot of alcohol and that whenever she did this led to her acting in a sexually suggestive way.

Several cases - and not only those where the defence of "mistaken belief in age" was used - were observed which contained questions like "Is it not the case that you socialise with friends much older than yourself ?" and "Is it not the case that you hang around with a group of girls who date older boys ?' (case 3). Again this is to suggest that the complainer deliberately tries to appear older, but also the implication is that she probably has more sexual knowledge and awareness as a result of this association with older friends.

As well as testifying about particular events that they observed or were part of and which occurred in close proximity in time to the alleged assault, other witnesses (apart from the complainer) may also be asked to give evidence concerning the lifestyle or the habits of the complainer. Sometimes this may not be evidence that has already been raised during the witness' s evidence-in-chief. To reiterate, cross-examination is not limited to matters on which the witness has given evidence in examination in chief, but may range beyond those matters so as to elicit information not already brought out which may be in favour of the case of the defence.[13] Several cases were observed where witnesses were questioned directly about certain aspects of the complainer's character or lifestyle. The following example of questioning which seemed designed specifically to show sexual character involved several charges of lewd and libidinous behaviour and 'indecent behaviour' (s5 Sexual Offences (Scotland) Act 1976) by a father towards his daughter over a period of 9 years. She was 17 at the time of the trial. The purpose of this questioning of a defence witness who had no current contact whatsoever with the complainer appeared to be solely to introduce information about a previous suspected pregnancy two years earlier when the complainer would have been 15 years old. This was the first and only time that the suspected pregnancy was mentioned during the trial. What follows is the entire defence examination:

Defence: Do you know [complainer] ?
Witness: Yes, a while ago I did
Defence: When ?
Witness: About two years ago ?
Defence: Was she a friend of your family ?
Witness: No, she was a friend of my friend's daughter
Defence: What sort of girl was she ?
Witness: Pleasant girl
Defence: Did you ever see her distressed ?
Witness: Once. She thought she was pregnant and didn't want to tell her father or mother.

(Case 49)

Somewhat similarly, in two separate cases involving fairly young teenage girls, the mothers of both girls were asked by the defence about their daughter's lifestyle, and in particular whether they had boyfriends. In case 3 the mother of the 13 year old complainer was asked if her daughter "was in the habit of dating older boys" and specifically about whether she had ever gone out with a 19 year old boy, and if she had given her permission to do so. In case 15 the mother was asked about her daughter's boyfriends, but was also subjected to detailed questioning about her daughter's clothes and make-up and group of friends. In a third case, involving lewd and libidinous behaviour towards a 7 year old, the complainer's aunt was asked by the defence "In a sexual context, would you describe [complainer] as precocious ?" (case 4).

[13] Witnesses may also be cross-examined with a view to destroying their credibility

The following series of questions were asked of the stepfather of the 13 year old complainer in case 2:

Defence: Was [complainer] friendly with older boys ?
Defence: Did you observe her sitting on men's knees ?
Defence: Was she prone to going willingly with men ?
Defence: Do you think she is 'overly friendly' with men ?

Sometimes evidence which has character connotations can be elicited from other witnesses as evidence that is relevant to specific issues in the case. For example, case 27 concerned charges of 'unlawful sexual intercourse' with a girl under 16 years (s4 Sexual Offence (Scotland) Act 1976) by two young men in their late teens/early twenties. The complainer was a 14 year old girl who had met the two men whilst on her own in a city centre one day. She was 15 at the time of the trial. At the outset of the trial it was stated that the statutory defence of 'belief in age' would be used, and this was the only case where this defence was specifically invoked.[14] The defence case was that the two accuseds had reasonably believed that the girl was at least 16 years old. Friends and acquaintances of the complainer were called as witnesses by the defence and questioned about their relationship with her, and how they spent their leisure time together. These witnesses were questioned by the defence in an attempt to verify that they were generally several years older than the complainer; that she deliberately "sought out" older friends in preference to younger ones; that she tried to "appear older" than she was by a deliberate choice of clothes, hairstyle and make-up; that she frequently lied about her age; that she was always "dressed up to appear older"; and that she was "not shy". Here, evidence specifically about 'belief in age' also takes on character connotations.

One other defence tactic that is particularly noticeable in relation to young complainers is to introduce evidence concerning the lifestyle of other witnesses, usually relatives or friends of the complainer. This type of evidence is used to 'set the scene' as it were, placing the complainer in various stereotypical contexts, by association with other witnesses whose own sexual or general character and/or lifestyle is brought into question. The first questions asked of the mother of the complainer in case 43 illustrate this:

Defence: I understand that you were married at 16 and that you were carrying [the complainer] at that time ?
Witness: Yes
Defence: Shortly afterwards you left your husband and started living with Mr ..... ?
Witness: Yes
Defence: Your marriage and relationships have all been quite problematic ?

[14] This defence applies if the male perpetrator is under 24 years of age and he reasonably believed that the girl was of or above 16 years old. This defence only applies if he has not before been involved in a trial of a similar nature

It was noticeable that, wherever the opportunity arose, the defence would place great stress on any suggestion of unconventional or wayward behaviour by the complainer (and, as evidenced by the above quote, on the behaviour of her family or associates as well). This was particularly vivid in case 25 where the image of the complainer which was being evoked throughout the entire trial was that of a *wild child*. In this case the 15 year old complainer was portrayed as someone who was continually getting into trouble at school, who was irreverent, cheeky to teachers and neighbours, who played truant, who was beyond the control of her parents. The *wild child* portrayal continued by reference to her smoking, drinking and gum-chewing habits and her "hanging around with an older crowd". Questions were asked of her and other witnesses in the case concerning whether she sniffed glue or took drugs. Much was made by the defence out of the fact that she had a small tattoo on her arm. The following series of questions were asked of her in cross-examination:

Defence: Have you ever tried to run away from home ?
Defence: Did you not climb out of the window of your Gran's house at night and run around the streets ?
Defence: Have you been glue-sniffing ?
Defence: Were you ever injecting drugs ?
Defence: Do you have a tattoo ?
Defence: Did you r mother know you had a tattoo ?
Defence: Was your mother happy for you to have a tattoo ?

This line of questioning, designed to discredit the complainer through the use of character evidence, was continued in the cross-examination of other witnesses in the case. The questioning also took on specifically sexual character connotations when the defence moved on to suggest that the complainer was in the habit of running away from home (unsubstantiated) and engaged in indiscriminate sex whilst "on the run". It was also alleged that she had climbed out of the window of her Gran's house in order to make a pre-arranged assignation with a boy in a park at midnight. There was also much discussion in the trial concerning her sexual history despite medical evidence of virginity and this is described in the following section. In a second case involving the wild child typification, the questions put to the complainer were not so explicit, although during the defence summing up to the jury, the complainer was described as "a troublesome child, with a history of running away from home."

Case 1 was the case mentioned earlier (in *The Complainer as Sexually Knowledgeable*) which involved a somewhat bungled attempt by the defence to show that the 9 year old complainer had sexual knowledge. When this backfired he went swiftly (and seamlessly) on to suggest she was of dubious character. He began by asking whether she played truant from school. Thereafter followed a series of questions to suggest that the girl was in some sense untrustworthy and out of control. 'Bad' character can be remarkably easy to convey.

The defence later cross-examined the child's remedial teacher to whom she had complained about her sore genital area, and as the following extract shows again attempted to cast her in a particular light :

Defence: [The complainer] is below average intelligence ?
Teacher: Slightly
Defence: And in July last year she emitted an offensive odour ?
Teacher: It was that which alerted me to the possibility that all was not right [the girl had contracted a vaginal infection as a result of the sexual contact]
Defence: Did she have any particular difficulties at school ?
Teacher: Not really
Defence: Any unusual behaviour ?
Teacher: Sometimes
Defence: Did she play with rubbish ?
Teacher: Yes
Defence: Did she pick it up and eat it ?
Teacher: Yes
Defence: Did she know any of the technicalities involved in sexual intercourse ?
Teacher: I don't know
Defence: Did she know the words ?
Teacher: She had her own words

(case 1)

Whilst not exactly invoking the *wild child* image, the defence intention appears to be to convey an image of a child with strange, distasteful, and dirty habits. Whether the defence was intending to display the child as mentally disturbed, one cannot be sure, but certainly the suggestion of below average intelligence has implications for her reliability as a witness. The overall effect was to cast her as somehow alien, not normal.

The Complainer as Sexually Experienced

The sexually experienced complainer is, in many ways, a gift to the defence case, not only with regard to the construction of sexual character but also, strongly, in relation to the issue of consent. Not only is her previous sexual experience concrete 'evidence' that she has 'consented' with someone else in the past, it is also a sure sign (an *indisputable* sign for the defence) that she possesses a sexual character. In those cases where the complainer had in fact had sex with someone else before the alleged assault, the defence made much mileage out of this information. For example, in case 43 which involved the age-defined statutory offence of 'indecent behaviour towards a girl of between 12 and 16 years' (s.5 Sexual Offences (Scotland) Act 1976) by an uncle, it was alleged that the 14 year old complainer had previously had sexual relations with her stepfather, and that this was the subject of a future criminal trial. This case also involved a special defence of incrimination concerning the stepfather, that is, to suggest that he, rather than the accused, was responsible for the assault.[15] The alleged past sexual behaviour with the stepfather was

[15] Although the legislation allows for an application to be made under subsection 141B (1) (b) (ii) on the grounds that evidence would be relevant to incrimination, the legislation was not utilised in this particular case.

therefore repeatedly returned to by the defence in cross-examination in a variety of ways, for example :

Defence: You've had some problems at home with your mum and stepdad. Your mother has been involved in this, and has in fact assisted your stepdad ?"
Defence: You know that you are going to another court on [date] regarding the things that your stepdad did to you , and since this started there has been nothing but talk about these sexual things. "
Defence: And the truth is that this case started when your stepfather tried to get [the accused] involved as well because he knew [the accused] was giving you money."

Not only does this raise the issue of incrimination, but is also raises the question of the complainer's credibility and also a motive for false allegation.

Two cases in particular (cases 40 and 50) involved the use of specific information which was contained in the medical report and which was used as evidence concerning the complainers' previous sexual experience. In both these cases, this evidence had very strong, and very obvious, implications for sexual character. The latter, which involved a 17 year old, involved evidence concerning a previous full-term pregnancy. In the former, the 17 year old complainer had had an abortion.

But even in cases where there is no clear evidence of past sexual behaviour and nothing to suggest that the complainer is sexually experienced the defence may still attempt to question the complainer on such matters. For example, in one case involving a charge of rape, the prosecution asked this series of questions of the 13 year old complainer "Do you understand the meaning of menstruation ?" "Have you commenced menstruating yet ?" "What form of sanitary protection do you use ?" "Do you use tampons ?" (case 51). The complainer replied that she did not use tampons. (At the time, this struck me as a rather odd line of questioning.) All was made clear during the defence cross-examination however, when an application under the legislation was made to question the complainer "about her knowledge of sexual matters" on the basis that "her hymen is not intact and could only hold one finger. She does not use tampons. [Lack of hymen] could be consistent with prior sexual intercourse. The defence stated that he wished to question her on her sexual knowledge and experience because her answers may have a bearing on her credibility. He went on to say that the medical report had stated that her hymen would admit one finger, the complainer had stated that she did not use tampons and had also said that she had never had sex before. The application was allowed, and the subsequent questioning focused on the complainer's sexual experience. As it turned out there was nothing to suggest that she was sexually experienced before the alleged rape. Nevertheless the somewhat speculative discussion about her damaged hymen had strong implications for her sexual character.

In another case, the defence made a (partially) successful application to introduce "evidence of the complainer's repeated casual sexual intercourse with a large number of youths in the [local] area over the period of the past three years, and the fact that she boasted of sexual conquests" on the grounds that it was in the 'interests of justice' to do so. Again, this was not substantiated, but the depth and range of the subsequent questioning had implications for her sexual character.

Inevitably, virginity is a big issue in cases involving young complainers. The presence - or recent or long-term absence - of a hymen is something that is routinely stated in the medical report. Evidence of a long-term absence of hymen is taken by the defence to be indicative of past sexual activity, thus substantiating the picture of the complainer as a sexual being. As may be expected - and as demonstrated in case 22 cited above - a long-term lack of hymen was always equated with sexual experience by the defence and, even when evidence from an 'expert' forensic or medical witness offered an alternative explanation for the lack of hymen than sexual intercourse, the defence still adhered to the explanation of sexual non-virginity.

In some cases involving young complainers, good character was made an issue (sometimes inadvertently) by the prosecution - particularly in those cases where the complainer was , or had been, a virgin. Most commonly, evidence of virginity was introduced by the prosecution, either verbally, but often through reference to the medical report. In fact the prosecution evidence was most frequently and directly challenged by the defence in relation to the question of the complainer's sexual experience, and specifically the presence or absence of hymen. Once such evidence has been introduced by the prosecution, it is picked up by the defence and explored in cross-examination. This was what happened in case 22 where, in addition to trying to suggest sexual character through sexual knowledge, the defence was also pursuing the issue of credibility by testing the complainer's consistency with regard to what she had said earlier to the prosecution in her examination-in-chief about "nothing like this" ever happening to her before. Whilst somewhat ambiguous, the defence construed her statement as evidence of her setting herself up as having a 'good' sexual character. In this case, the defence made a successful application to question the complainer on her virginity, on the grounds that the medical report showed a lack of hymen.

Of course, where the complainer has had previous sexual experience this information is seized upon as it adds considerable weight to the construction of sexual character. But even where there is evidence of a recent lack of hymen, which the prosecution may present as a positive signifier that the alleged sexual assault took place is addressed by the defence as simply that - circumstantial evidence of consensual sex.

The issue of masturbation was brought up in about a fifth of contested trials, and appears to be used, amongst other things, as evidence of sexual experience which has significance for the construction of sexual character. Masturbation is a sexually significant signifier, used explicitly to suggest that the complainer is sexually 'functioning'. For example, in case 25 which involved the blatant *wild child* typification referred to above, the issue of masturbation was picked up in cross-examination and was the subject of prolonged and detailed questioning. An application was made by the defence who wished to seek an alternative source to the medical finding of vaginal swelling. The medical evidence showed an intact hymen and the defence had no other alternative source to point to, but nonetheless he wished to question the complainer about other forms of activity which might have led to the genital swelling. The following questions were asked of her:

Defence: Were you involved with any boy apart from [accused] ?
Complainer: No
Defence: Did you insert anything into your private parts ?
Complainer: No
Defence : Do you know what masturbation is ?
Complainer: Yes
Defence: Were you in the habit of masturbating last year in July ? [the time of the assault]
Complainer: No

These questions were juxtaposed with questions pointing to her *wild child* lifestyle and, cumulatively they enhanced the image of the semi-delinquent bad girl. Here the defence, in addition to trying to suggest that the complainer was a sexual being who had experienced self-induced sexual arousal, was also looking for an alternative source for the vaginal swelling suffered by the complainer and noted in the medical report.

The Effects of Sexual Character Evidence

The construction and ascription of sexual character is very prevalent in trials involving young complainers. Indeed, the defence quest to ascribe sexual character is so common as to be almost a routine part of the trial. The defence commonly engage in an inventive process of 'sexualising' evidence in such a way that the construction of sexual character is virtually inevitable.

The focus on sexual character through the mechanism of stereotypical images of female sexuality signifies the dominance of specific notions of female sexuality in the court room. This is something with which feminist commentators have long been familiar in relation to rape trials. Smart (1989) for example has argued that the legal treatment of (adult) rape victims reaffirms a particular form of heterosexuality and disempowers women.[16] However, on the evidence presented here this appears also to be the case for younger women and girls.

16 Smart, C. (1989) *Feminism and the Power of Law* chapter two

The routine construction of sexual character is also a matter for concern because young complainers are thus exposed to the same repertoire of arduous questioning that occurs in sexual offence trials involving adult women. But the construction of sexual character, although sometimes a means in itself, is very often not the end of the story. Sexual character, once ascribed, has important implications and is applied in the trial in a number of ways. These are described more fully in the following chapter.

CHAPTER SEVEN

CONSENT AND THE "RAPE MODEL"

Stereotypes and Stories

The last chapter focused primarily on the construction of sexual character through the evocation of stereotypes of female sexuality. But, as noted in that chapter, the construction of sexual character is not the end of the story. Sexual character, once ascribed, has important implications and is 'put to use' in the trial in rather compelling ways. Most significantly, sexual character construction functions as an important precursor to the imputation of consent on the part of the complainer. First, the ascription of sexual character acts as a forerunner to the depiction of the complainer as a *sexual being* - someone who is sexually aware and potentially sexually active, someone who possesses a sexual essence. Second, the depiction of the complainer as a *sexual being* feeds into the presentation of the complainer as *that type of girl* - as someone who is *likely* to consent to sexual activity. The two are inextricably linked in defence rhetoric, and examples of conflationary comments confirming this 'interrelationship' were found in approximately two thirds of the trials. The relationship of sexual character to the issue of consent has, at its root, the distinction between those who are 'chaste' and those who are 'unchaste' - the two opposing images of women and girls. The stereotypes of 'good' and 'bad' encompass particular notions of female sexuality - as those 'who do' and those 'who don't'. The implication is that those who are sexually experienced, who have consented to sex in the past, who have a sexual character, are more likely to consent to sex again. The articulation of a 'bad' sexual character which sets up the general presumption or propensity towards consent was specifically outlawed by the Scottish legislators (see Chapter Four for a discussion of the legislation). Yet observation of trials involving young complainers suggested that the potential for suggesting consent is considerably heightened where the foundations of sexual character have already been laid. In such trials, defence rhetoric appears to be underpinned by the implicit presumption that there *is* a direct relationship between sexual character and propensity to consent.

The next two chapters will examine this focus on consent, in particular what appears to be the paradox of the consenting young complainer. This chapter is primarily concerned with the puzzling image of the *consenting* young complainer, and specifically with the way in which consent is used in relation to key evidential issues in the trial. In this chapter, close attention is paid to how images of the consenting complainer (underpinned and conveyed by evidence of sexual character) are fed into 'stories' about the sexual activity that is the subject of the charge. The emphasis here is on the way(s) in which stereotypical images of

young female sexuality become integral components of an ongoing narrative in the trial about the complainer and her involvement in the sexual activity, the events that led up to it and the events that followed it. The following chapter offers an explanation for the predominance of consent-based arguments in such trials.

The Paradox Of The Consenting Young Complainer

But before embarking on a fuller analysis of the consenting young complainer using information drawn from observation of trials, I wish to draw attention to the fundamental paradox which, at first sight, seems inherent in the particular construction of the consenting young complainer. Court observation revealed that constructions of the consenting young female complainer, and the use of evidence to show consent play an integral part of the legal-evidential routine in sexual offence trials. This is something of a paradoxical finding because, as it will be recalled from Chapter One, consent to sexual relations by a female under 16 years is considered invalid in Scots law.[1] Essentially, the process of interaction between the complainer who is not yet 16 years old and the accused concerning consent to the sexual act is not pertinent to the fact of the crime. It will also be recalled from Chapter One that consent with a girl under the age of 12 years is *impossible* because her young age precludes her from having the capacity for real consent in the matter. For girls over 12 years and under 16 years, although the law recognise that they have the capacity to consent, their consent is rendered *irrelevant* . Thus the issue of consent, one would think, would have no real intrinsic bearing on the nature of the sexual offence at issue, nor on the question of the guilt of the accused. So why is the question of consent so consistently focused upon during such trials ? Why are young female complainers routinely characterised as *consenting* to the sexual activity when their consent is technically rendered impossible or irrelevant ? For example, in offences defined by the age of the complainer, such as the statutory offences where the consent of the complainer is irrelevant, then age has to be proved. These are strict liability offences defined solely in terms of the age of the complainer, and one may therefore expect the evidential crux to be a straightforward matter of proving first that the offence took place, and then proving age in relation to the accused's belief in the age of the complainer. Mistaken-belief-in-age is a recognised defence in relation to such offences,[2] although court observation revealed that it was very rarely used.[3] Similarly in incest offences one might reasonably expect evidence proving first that the offence took place and then proving the relationship between the

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[1] Gane, C. (1992) *Sexual Offences* ; Gordon, G.H. (1978) *The Criminal Law of Scotland*

[2] It will be recalled from Chapter Two that there is a statutory defence available to a charge of s 4.(1) Sexual Offences (Scotland) Act 1976, 'unlawful sexual intercourse with a girl between 13 and 16 years' providing that the accused is under 24 years and has not been charged with a like offence.

[3] Informal conversation with court officials indicated that they believed that cases involving young men under 24 and young girls under 16 years rarely made it to court in the first place. This is because such cases are often, as one official put it 'young love' cases where the procurator fiscal decides not to prosecute

complainer and the accused to be vital. One would not think that consent would be an important issue, far less the most deliberated question in such trials.

'Rape Model' Arguments and the Battle Over Consent

As stated earlier in the thesis, the issue of consent is inextricably bound up with the definition of the crime of rape and thus the woman's lack of consent is a crucial element of the crime of rape. However, Brown et al (1993) found the most common defence to rape in trials involving adult women is that sexual intercourse took place with the *consent* of the woman.[4] That the complainer consented is a particularly problematic assertion to counteract - and often - primarily because of corroborative difficulties - this really does frequently turn into a question of the complainer's word against that of the accused.

Before proceeding further, it is necessary at this point to briefly recall the evidential requirement of corroboration discussed in Chapter Three. To reiterate, every material fact has to be corroborated by two independent sources. Because sexual assaults tend to take place in the *absence* of any eye or ear witnesses to the event, corroborating evidence that the sex took place in the absence of consent can often be very hard to find. Corroboration is therefore sought from elsewhere. In sexual offence trials, possible sources of corroboration that the offence took place *and* that it took place in the absence of consent are, for example, dirty or damaged clothing, bodily injury to the complainer (and also sometimes to the accused), signs of resistance by the complainer, and 'first report' evidence which is evidence from the first person whom the complainer told about the assault and who can attest to her demeanour at the time - was she in an upset state? calm ? distressed ? nonchalant ? hysterical ? ambivalent ? Corroborating features are sought from a variety of sources. In addition to witness testimony, these standard corroborating signs may also be obtained from information contained in the medical report (evidence of bruising, swelling, abrasions, injury etc.) and also from the forensic reports (evidence of torn clothing, the presence of semen, etc.). Often the trial turns into a 'battle' over the interpretation of these *evidential signs* . These *signs* often constitute the main evidential issues in the trial and much of the 'battle' wages over attempts by the defence to establish consent and attempts by the prosecution to prove the absence of consent.

The widespread preoccupation with consent and, in particular, the predominance of consent-based arguments in rape trials has been well-documented (Chambers & Millar, 1983; Adler, 1987; Smart, 1989; Brown et al, 1993). This type of argument with its emphasis on, and ways of defining and proving consent on the part of the complainer, is usually associated with rape trials involving adult women. In such trials attention focuses

[4] Brown, B. et al (1993) *Sex Crimes on Trial*

on questions such as did the complainer consent to sexual intercourse ? did the accused reasonably or honestly believe that the sexual intercourse was consensual ? did sexual intercourse take place at all ? These questions explicitly raise the issue of consent and are most commonly deployed in relation to the key *evidential signs*, such as the presence or absence of injuries, damaged clothing, and signs of resistance by the complainer.

The Infiltration of the 'Rape Model'

Brown et al (1993) found that consent-based arguments - which they term 'rape-model' arguments - were a characteristic of both rape trials and trials for other sorts of sexual offences involving adult women where consent was not a specific element in the definition of the crime. Somewhat similarly, in the research discussed here 'rape model' arguments were a dominant feature of trials involving girls and young women. Moreover, 'rape-model' arguments were not restricted to rape trials involving young complainers, but were freely used in relation to other sorts of sexual offences, including the statutory age-related offences.

Discovering the prevalence of overtly consent-based arguments in trials involving young complainers was a very puzzling finding. It was also a fairly disconcerting finding, considering that a focus on evidence of consent by the defence has long been the subject of criticism where it arises in sexual offence trials involving adult women.[5] Clearly a focus on consent with its emphasis on whether or not she displayed her lack of consent to the accused can constitute an extremely testing experience for the complainer in the trial. The use of such arguments in trials involving young women is a matter of some concern because it means that young complainers are thus exposed to the same repertoire of testing questions that occur in rape trials, with even less justification. There is yet another reason why the emphasis on consent in such trials can be considered surprising. This is in the light of the 'shield' legislation restricting the admissibility of sexual evidence - yet it is precisely this sort of restricted evidence which is commonly drawn upon in defence attempts to establish consent on the part of the complainer.

The dominance of consent-based arguments in trials involving young complainers may well be a paradoxical finding, given that in all sexual offences involving girls and young women under the age of 16 years is technically irrelevant. But what was also abundantly clear were the similarities between these trials and rape trials involving adult women. Strong parallels can be drawn on several levels: those evidential issues which hinge on consent that routinely appear in rape trials are applied where younger women are involved;

[5] See for example Estrich, S. (1987) *Real Rape* ; Smart, C. (1989) *Feminism and The Power of Law*; Brown, B. et al (1993)*Sex Crimes on Trial*; Adler, Z. (1987) *Rape on Trial;* Edinburgh Rape Crisis Centre response to the Scottish Law Commission Consultative Memorandum no 46

the same tests of consent and non-consent are used; courtroom practices and defence rhetoric are markedly similar; stories about the alleged events and the images of complainers largely converge with those that appear in rape trials. The 'rape model' appears to have infiltrated an area where, on the legal face of it, it does not technically belong.

Consent and Evidential Issues

As in rape trials involving adult women, the story of the consenting young complainer is built up through challenging and re-interpreting the signs of the crime and the complainer's account of what occurred, whilst consistently searching for signifiers of consent. Evidential issues such as appropriate 'first report' evidence, delay in reporting, the presence or absence of injuries, and evidence of force and resistance are explored with similar weight as that given to such evidence in rape trials. It is very rare however, for any sexual offence case to demonstrate evidence for all of the standard signifiers. Of course, there must be some corroborating evidence, otherwise the case would not have reached the trial stage, but no case was observed which contained corroborating evidence from all of the standard sources.

These main sources of corroboration provide the standard signifiers of sexual assault despite the large and convincing body of criticisms which maintain that they in fact represent a rather idealised and inaccurate image of the victim, the sexual assault, and the victim's experience of the assault. As discussed by Adler (1987), research has shown that there is really no such thing as a 'normal' reaction to being raped, whilst some victims may display extreme distress and anxiety, others may appear calm and collected which is often a sign of shock and trauma.[6] A focus on overt physical signs of the sexual assault and/or evidence that the complainer was extremely distressed following the assault veers dangerously close to the formation of a standard and prescriptive picture to which 'real' sexual assaults and 'real' victims should conform. Moreover, an over-reliance on such signifiers as evidence of force and resistance and injuries largely ignores the possibility, for example, that coercive sex can be achieved in the absence of physical violence. Nonetheless these signifiers remain the standard tests of sexual assault.

In the trial, the defence will try to focus on the *absence* of these standard signifiers in an attempt to establish that the complainer in fact consented to the sexual activity. So, for example, if there is no visible sign of injury on the complainer's body, then the defence will use that evidence of lack of injury to 'show' that the complainer consented. Of course, in terms of corroboration, if the complainer's account is that she received a severe beating in the course of the sexual assault, and if there is no sign of any injury, then her account of

[6] Adler, Z. (1987) p 12-13

being violently attacked cannot be corroborated (this may also be relevant for her credibility). But even in cases where the complainer's account was that she did *not* receive any injury, but rather was threatened or coerced by the accused and so evidence of injuries would not therefore be expected, her lack of injuries will be focused on by the accused as a positive indicator of consent. By focusing on the issue of consent in such circumstances, the defence goes beyond the overt evidence, as it were, to insinuate, at every opportunity, that an absence of one of the standard signifiers equals consent.

But the defence preoccupation with consent in sexual offence trials extends beyond emphasising lack of signifiers. Because even where corroborating evidence for sexual assault *is* present and there *is* strong corroborative evidence of injury for example, the defence will then try to turn it around into evidence of consent by negating it as evidence of non-consent, according it a different meaning, or putting forward an alternative version. Thus tests of consent and non-consent are consistently applied to what appear as seemingly straightforward evidential issues in the trial.

The deployment of rape model arguments and forms of questioning contribute immensely to the ordeal faced by the young complainer in the witness box. These sort of defence lines can not only prove very confusing for the complainer, but they are also very harassing. Often such questions focus on the smallest of details and can generate a plethora of confusing and unnecessary 'possibilities'. By fielding several different interpretations of evidence (seemingly simultaneously), the defence can effectively create a smoke screen of dubiety around the complainer and her tale of the events. Some of these alternative interpretations may ultimately turn out to be nothing more than evidential red herrings thrown out by the defence in what often seems to be a concerted effort to confuse, harass, and upset the complainer.

The rest of this chapter draws on the research findings to illustrate the prevalence of consent-based argument in trials involving young complainers. There are two main aims here. One is to try to show what a fundamental position the issue of consent holds in such trials and, crucially, how it gets related to the key evidential issues on the trial. The other is to try to show how the image of the consenting complainer fits into ongoing narrative(s) in the trial concerning defence stories about the sexual activity and her involvement in it.

'First Report' Evidence and Delay in Reporting

Hearsay evidence, that is, the reporting by a witness of something that has been told to them is disallowed under the general rules of evidence. The rule against hearsay is designed

to prevent witnesses reporting what they or other persons said on other occasions.[7] However, the 'first report' made to a witness by a complainer very soon after the event can be seen as an exception to this. In giving 'first report' evidence, a witness is able to comment on the complainer's state or demeanour, but also what she said had happened to her. 'First report' evidence is important in sexual offence trials as it is often admitted in relation to the complainer's credibility, usually as evidence of the veracity and consistency of her account of events. Disclosure and distress after the event is also investigated as evidence of lack of consent and hence the absence of a witness who can testify to the complainer's distress after the event is presented by the defence as evidence of consent.

However, what began as an exception soon became a presumption. The presumption regarding 'first report' seems to be that a complainer who had just experienced non-consensual sex would make her allegation *as soon as possible* after the event and also that she would tell the *first person* with whom she came into contact about her ordeal, whether that person is known to her or not. The fact that she did not tell anybody immediately afterwards is often used by the defence to 'show' that she had sex willingly. Sometimes it is also used by the defence as evidence that no sex had taken place at all. As has been emphasised throughout this thesis, not only can evidence play a multiplicity of functions for the defence, but it is also perfectly common for the defence to run several lines of defence during the course of the trial which may even contradict one another. In case 22 where the 14 year old complainer was allegedly raped by her uncle in her father's house, the fact that she did not run out of the house to tell the man in the ice cream van which passed by the house shortly afterwards was used by the defence both to suggest that the sexual assault did not occur and also to suggest that she had consented to it. The worth of 'first report' evidence decreases if the complainer did not act on the first chance that she had to tell someone what happened, but as Brown et al (1993) point out, what constitutes an opportunity to tell someone is highly contentious.[8]

A second, but no less important presumption is that someone who has recently been subjected to a sexual assault would appear distressed and upset and distraught and this would be reflected in 'first report' accounts. Where a witness attests that the complainer did not appear unduly emotionally distressed, then this too is used to show that the complainer had willingly participated in the sexual activity. In several cases involving younger girls the 'first report' evidence on demeanour was that they did not volubly display extreme distress in a way that the defence clearly believed that, as victims, they should. In some of these cases, the 'first report' evidence described complainers as "withdrawn", "very quiet",

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[7] Wilkinson, A.B. (1986) *The Scottish Law of Evidence* p.33 The rule excludes all sorts of assertions other than those made by the witness of his or her own knowledge

[8] Brown, B. et al (1993) p 187 - 187

"submissive" or in one case, "giggly" when they relayed what had happened to them. One interpretation of this sort of behaviour is that it is in fact vividly symptomatic of shock and trauma. But it does not fit the stereotypical picture held by the defence of the crying, screaming, distressed complainer , and as such is presented as evidence of her willingness to take part in sex.

There were a number of very memorable cases involving young complainers where the absence of 'first report' evidence was turned around by the defence into evidence of consent. This happened most frequently in cases of incest or where there was a close relationship between the complainer and the accused. For example, in a trial involving a number of sexual offences which took place over a period of four years from the time that the girl was 9 years old and where the accused was her mother's cohabitee, the defence commented twice in asides to the jury that "the girl clearly enjoyed it as she didn't report it." (case 33) This kind of interpretation ignores the possibility that the young complainer may have been threatened or intimidated or coerced into silence by the accused.

In several trials, particularly where the accused is in a position of close relationship, trust or authority in relation to the complainer, the offences took place over a protracted length of time. In some incest cases, this was over a period of several years. In such cases there was a delay in reporting what happened and the 'first report' was made a long time after the sexual behaviour had commenced, and sometimes after it had ceased to take place. Sometimes the behaviour came to light because an allegation was made by a second complainer; or because the first victim believed that her sibling was being targeted for sex by the accused; or, as in a few cases, following a catalytic event such as when a mother gave her 10 year old daughter a sex education booklet (case 20), and a nine year old and her grandmother watched a television programme on a sexual abuse help-line for children (case 23).

Even in cases where, in court, the complainer was able to explain her silence as due to embarrassment, horror, ignorance, guilt, or, as in several cases, the belief that she would "get into trouble" with one or both parents, the long delay and absence of an immediate 'first report' was still presented as evidence that either nothing had happened at all, or most frequently that she had willingly participated. This was particularly so in those cases where the complainer had said nothing about the sexual behaviour, but someone else had inadvertently found out what had happened, for example, where a mother found what she thought were semen stains in her daughter's underwear; where an older brother accidentally 'discovered' his sister and the accused having sex (unusual in that it involved an eye-witness); a 12 year old girl became pregnant; a suspicious neighbour found the accused

fondling his two young nieces, and; in two untypical cases where it was actually the accused who confessed to a relative and a friend.

The absence of an immediate complaint and a time lapse between the event and telling someone about it are taken to imply a compliance on the part of the complainer, and in turn a lack of trauma. But even where there *is* prompt reporting and this is made by a (suitably) distressed and upset complainer, the defence will still offer an alternative interpretation challenging her account of what occurred. Consider the following example : a series of (fully corroborated) mishaps led to a teenager who had been out with her friends missing the last bus home. She telephoned for a taxi and, whilst waiting outside the telephone call box for it to arrive, a car driven by a complete stranger stopped and asked her if she wanted a lift. She refused. He drove off. Minutes later, the car returned and stopped, the man got out of the car, dragged her over a fence and into a nearby field and attempted to rape her. He then left her lying in the field and drove off. The taxi arrived, to find the girl very distressed and incoherent, covered in mud, one shoe missing and her clothing torn. She gave her address to the taxi, but did not tell him what had happened to her, but told her parents what had happened as soon as she arrived home. In cross-examination, the defence insisted she had had consensual sex, and explained her distress and allegation of attempted rape as "a show of pretence" because she would not otherwise be able to explain her lateness and her torn and muddied clothing and she was afraid that she would get into trouble with her parents for having sex and for being late home (case 21). Of course, in doing so, the defence was also introducing a motive for false allegation at the same time as arguing consent, but as has been emphasised it is quite common for the defence to run several lines of argument simultaneously.

Resisting the Assault

How the complainer resisted the assault takes on importance not only because it is treated as an indicator of her general unwillingness to participate, her 'lack of consent' in other words, but also because resistance can be corroborated. Shouts and screams can be heard - if there is anyone to hear. Neighbours may verify an account of a struggle if they overheard screams or bangs or loud noises. Struggle can be corroborated by medical and/or forensic evidence of torn clothing, or injury to the complainer. It may possibly be corroborated by signs of disarray in a room or evidence of a struggle in the immediate area surrounding where the assault took place, and this evidence would be introduced into the court room through the testimony of a 'scenes-of-crime' police officer and backed up with photographic and/or forensic evidence. Resistance by the complainer can also - occasionally - be evidenced by injuries sustained by the accused.

The prosecution, in taking evidence from the complainer, will often focus on how she made her non-consent or her unwillingness clear to the accused. This is a routine part of prosecution questioning in rape trials involving adult women, but court observation suggests that this practice has also permeated into trials involving younger women and girls. In cross-examination, the defence will again focus on any lack of signs of resistance to substantiate the argument that she in fact 'consented'. What happens in this process of examination and cross-examination is that the absence of any of the standard pieces of evidence which the prosecution use to support their case that the sex was non-consensual is turned into positive evidence of consent by the defence. Interrogatory questions such as "why did no one hear you scream ?" "why did no one hear you struggle ?" "how was it that no one saw this happen to you ?" "why are there no marks to show you struggled ?" are fired at the complainer, often in a very hectoring and intimidating manner.

At the same time, the defence will also focus on whether the complainer did in fact actively resist and, if she did, the manner in which she resisted. Defence lines of questioning specifically aim at establishing whether the complainer did everything that she possibly could to vocally and physically state her unwillingness. The following are examples of typical defence questions fired at complainers "are you sure that you did everything you could to resist ?" "why did you not fight back ?" "are you sure that you screamed/shouted/cried out ?" "why did you not kick him between the legs ?" "why did you not poke him in the eyes ?" "why did you not hit him with the chair ?" This sort of 'rape model' type of questioning - in fact exactly the same sort of standard questioning is commonly found in rape trials involving adult women. [9] But in the observed cases involving young complainers not only do such 'rape model' style questions concerning consent appear misplaced - they also contribute hugely to the ordeal of giving evidence in sexual offence trials. In the observed trials, evidence of resistance signified by shouting or screaming or fighting back was rare. In many cases, especially those involving incest, the absence of the resistance signifier could perhaps be explained by the fact that the sexual behaviour formed part of a long-established pattern of sexual abuse, many of the complainers were very young, they were threatened or intimidated into keeping quiet about events, and the perpetrators were well known to them. In fact in several cases, the complainer and accused had a very close relationship, and were for example, relatives, neighbours or family friends.

During the trial, witnesses may be requested to relate what they saw or heard in relation to the alleged assault or, for example, to describe their involvement in events leading up to or

[9] Brown, B. et al (1993) document several such cases. In one case involving an adult complainer the woman was asked why she did not grab the shot gun which the accused was pointing at her, and in another the 4 foot 10 inch woman was repeatedly asked why she did not fight back against her 6 foot two inch, 12 stone attacker.

following the incident. For example, it is common to call witnesses who saw the complainer and accused together *prior* to the incident and elicit information concerning the witness's perception of how they were behaving towards each other. Such evidence is often the source of dispute over whether the complainer resisted the accused or not. The questioning often follows a similar format, with the prosecution first trying to establish that the complainer and accused did not appear as if they were preparing to have sex soon afterwards, and the defence trying to show that they were, and by so doing implying that she consented. To illustrate this, what follows are two extracts, the first from the prosecution examination and the second from the defence cross-examination of a teenage witness who saw the complainer and accused together about an hour before an alleged attempted rape of a 14 year old girl by an older boy in a local park:

Prosecution:..... and when you saw [complainer and accused] in the street, did they appear to be talking to each other ?
Witness: Aye
Prosecution: Did you hear what they were saying to each other?
Witness: No really
Prosecution: Did they appear to be on friendly terms?
Witness: No really
Prosecution: Did you see [accused] pull [complainer] in the direction of the park ?
Witness: Aye, by the railings ..... he had hold of her arm

Defence: Did [complainer] appear to be distressed at all ?
Witness: No really
Defence: She was not distressed. Did she try and resist being pulled towards the park?
Witness: I dunno
Defence: Did she cry out to you for help?
Witness: No
Defence: So you did not think she was being pulled against her will?
Witness: I dunno, she wasnae crying
Defence: Was she struggling to get away from him?
Witness: No really ..... maybe ..... I dunno .....
Defence: She could easily have run away from him if she wanted to, couldn't she ?

(Case no. 42)

From this point on in the trial, the defence began to build up a picture- using the evidence of several witnesses - of the complainer as willingly entering the park with the accused with the intention of having sex there with him. The defence interpretation of the evidence of this particular witness was that the complainer and accused were "horsing around" outside the park and at no time did the complainer display any signs of distress or unwillingness to be with the accused, rather she appeared to be thoroughly enjoying the "game" as a kind of sexual foreplay. Subsequent witnesses who were also around the vicinity of the park prior to the incident and saw the complainer and accused together were similarly cross-examined. Although all witnesses attested to the accused pulling the complainer's arm, and none explicitly stated that they thought the complainer entered the park willingly, the defence interpretation of their evidence was that she displayed no distress, could easily

have got away from the accused if she had wanted, and was ultimately enjoying "fooling around" with the accused. Throughout the cross-examination of these witnesses, all of whom were children or in their very early teens, the defence continually asserted that the complainer freely and gladly entered the park and, by so doing, demonstrated her readiness to take part in whatever transpired thereafter.

Underlying the reliance on the signifier of resistance to show non-consent is the implicit assumption that 'real' victims of sexual assault would resist their attackers to the very last; that 'real' victims would do everything in their power to resist the assault, and shout, scream, holler and fight back regardless of the circumstances of the assault. In their study, Chambers and Millar (1986) also found that the defence frequently emphasised that 'real' victims would resist to the end.[10] The focus on how the complainer struggled and resisted is a major criticism of court room rhetoric that has been well-documented by several writers.[11] Despite the heavy criticism levelled at such practices - in terms of presenting a picture of what counts as 'real' rape which distorts the experiences of women, and also in terms of the ordeal of giving evidence - such practices unfortunately do still persist. There is, however, a further implication of this sort of defence tactic which focuses on how the complainer fought back. This is that such questioning makes clear that the burden of 'showing' or 'refusing' consent to sex is seen as the responsibility of the complainer, and is not something that is the responsibility of the accused.

The focus on how the complainer resisted the assault and showed her non-consent raises another important point, and this is in some ways indicative of the way that the law perceives gendered sexual relations. As Jamieson (1994) has pointed out in relation to trials involving adult rape complainers, the focus on how the complainer resisted fits with the notion that women usually need to be *persuaded* to have sex. Some resistance from the woman is expected by the man and seen as part of the 'normal' sequence of events.[12] This type of construction of the 'coy yet ultimately willing' complainer is also evident in the defence interpretation of case 42 quoted above. The presumption that a certain amount of sexually persuasive 'foreplay' is a 'normal' part of any sexual encounter is also apparent in questioning concerning the amount of force used and related questioning concerning injuries sustained by the complainer. It is almost as if a woman's "No" is not strong enough and her unwillingness can only be demonstrated through physical means.

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[10] Chambers and Millar (1986) *Prosecuting Sexual Assault*

[11] See, for example, Estrich, S. (1987) ; Adler, Z. (1987) ; Brown, B. et al (1993)

[12] Jamieson, L.H.A. The Social Construction of Consent Revisited (1994) paper presented at BSA Annual Conference (unpublished)

Force and Injuries

In Scots law definitions of rape, it is no longer required that force be used. Nevertheless, the presumption seems to be that signs of force are important in 'overcoming the will' of the woman. Brown et al (1993) found that juries were often presented with definitions of rape that privileged force.[13] Force thus appears to remain a sign of rape in Scottish court rooms. This emphasis on force and the physical results of force - most notably injuries - can also be found in trials involving younger complainers and in crimes and offences other than rape.

The presence or absence of bodily injuries to the complainer provokes much court room discussion. 'Significant' injuries may include cuts, swelling, bruising and abrasions to all parts of the body, but to the genital area in particular. Details about any injuries are routinely recorded in the medical report which, as has previously been mentioned, is a Crown production submitted to the court. In all sexual assaults which allegedly involve some form of physical contact, physical injuries are seen as major evidential determinants, key signs of the presence or absence of consent. The presence of injuries is presented by the prosecution as evidence of force and/or resistance which can corroborate the complainer's own account of what happened. For example, if the complainer stated that she was pulled or dragged by her limbs or punched anywhere on her body, then the presence of injuries on those precise parts of her body are presented as corroborating her account of force used by the accused. Lack of injury is used by the defence to show that the accused did not force himself on the complainer, she did not resist him and, by logical extension, she was a willing participant. Again, the emphasis on the presence or absence of injuries implies that 'real' victims are those that are badly beaten and injured.

This reliance on injury-as-indicator appears to be no different in sexual offences involving young complainers. When absence of any signs of force or injury is combined with a delay in reporting the offence, it would be very optimistic to expect to find any evidence of bruising or other physical marks to corroborate the complainer's account. In the following case, the complainer's account was that the accused had pulled her denim jeans off in order to have sex with her. The defence disputed this and was relentless in focusing on the lack of bruising around her lower abdomen and thighs that he presumed would accompany such a display of force.

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[13] Brown, B. et al (1993) quote a number of rape definitions given to juries by both judges and defence advocates, e.g. "The essence of the crime of rape is force"; "Sexual intercourse must have been forcibly against will"; "Rape is overcoming the female's resistance by physical violence or by using a lethal weapon". p 184

Defence: And you say that [the accused] ripped off your jeans ?
Complainer: Yes
Defence: Right off of your body ?
Complainer: Yes
Defence: How can that be so ? They were tight blue jeans were they not ?
Complainer: Not all that tight
Defence: But to remove them [the accused] would have had to exert a degree of force, not so ?
Complainer: He did
Defence: Then why are there no marks to show that force ?
Complainer: I don't know
Defence: I suggest there are no marks because you took them off yourself, didn't you ?

The lack of marks and the seeming improbability that the accused could have pulled them off without marking the complainer in some way was returned to by the defence throughout the cross-examination of the complainer and other witnesses. All the while the defence was slowly building up an image of the complainer as consenting to sex with the accused, and building on the story that she was willing but then changed her mind at a later stage and, frightened at what her parents may say if they found out, she fabricated an attempted rape.

Yet even where there *has* been prompt reporting and there has been an ensuing medical examination which documents strong evidence of injuries and marks that are consistent with the complainer's account of what occurred, these injuries are still highlighted by the defence and either turned into nothing more than the marks of 'normal' childhood or adolescent play activity, or dismissed as nothing more than marks of the 'normal' rough and tumble of sexual activity. Examples of the former include referring to bruising as due to "falling off a bicycle" or due to "energetic disco dancing".

Specific genital injury and/or internal damage would perhaps appear to pose more of a problem, yet this is frequently construed as circumstantial evidence of consensual sex. In fact, in one case, it was suggested that the soreness and redness around the complainer's vagina was a result of energetic "sexual exploration" and both the accused's and the complainer's sexual inexperience. In some cases, and as discussed in the previous chapter, it was suggested that the genital swelling or injury was due to masturbation by the complainer, once again picking up on the theme of adolescent sexual exploration.

Stories of Consent

Defence opportunities to construct an image of the consenting young complainer are not exhausted by casting alternative versions of evidence. The characterisation of the consenting young complainer is also conveyed by means of large narrative accounts about her involvement in the sexual activity that is the subject of the charge, and specifically about her relationship with the accused. These accounts are in effect much bigger 'stories' that pull in several elements of the defence argument.

Defence advocates are opportunistic in their appropriation of evidence which can be re-interpreted to fit their story of events. Indeed that is part of the art of the advocate and a feature of the adversarial system. Typically, an alternative version will be put to the complainer through a series of questions - some of which are in interrogatory mode and others more rhetorical in nature. This device seems to work on the premise that questions that probe the smallest of details are an effective means of unfolding the defence story. Of course they can also prove very harassing for the complainer. The following example of defence questioning of a 15 year old complainer regarding the accused's allegation that they had consensual sex illustrates this:

Defence: Is it not the case when you were upset, you sat down to be consoled ?
Complainer: No. I was pulled on to his knee by him
Defence: Did it not happen, you were upset and put your arms around him and were crying ?
Complainer: I wasn't crying
Defence: You were being comforted sitting on his knee ?
Complainer: He was not comforting me. I did not sit on his knee
Defence: You were washing the dishes. He came up behind ?
Complainer: Yes
Defence: You were enjoying his attention?
Complainer: No
Defence: You were leaning against him ?
Complainer: No
Defence: You had on jeans and a T-shirt. Your jeans were too big, quite loose at the waist ?
Complainer: Very
Defence: He put his hands in your jeans
Complainer: No
Defence: Whilst still at the kitchen sink you agreed to him slackening off buttons on your trousers ?
Complainer: What ?
Defence: While still at the kitchen sink you agreed to him slackening off buttons on your trousers ?
Complainer: No !
Defence: At the same time you tried to take down the zip of his trousers
Complainer: I totally deny that ![14]

One of the main ways in which such 'narrative accounts' proceed is by suggesting that the complainer indicated her consent or willingness to have sex at some time prior to the actual incident. This is most frequently done by recasting the complainer's version of events and utilising information from other witnesses in the trial. A first step is to impute a friendly - if not blatantly flirtatious - relationship between the complainer and the accused. For example, in one case the accused worked in a local shop, and the defence construed the complainer's regular visits to the shop as evidence that she 'fancied' the accused, although the complainer denied this (and appeared shocked when this was put to her in the witness box) (case 6). Similarly, in another case involving two accuseds, the defence story was that the complainer had told one of them that she 'fancied' the other a few days before the

[14] This example is also quoted in full in Brown B. et al (1993) p 189

activity that was the subject of the charge, and that she asked the first accused to set her up with a date with the second accused (case 19).

Any previous sexual conduct with the accused is regarded as being strong evidence of consent. As Brown et al (1993) found in relation to trials involving adult complainers, past sexual conduct with the accused was usually deemed relevant to consent, and in fact consent was the crux of the defence case in the majority of the applications under the legislation which were made to introduce evidence of past sexual relations with the accused. In this research, in two cases involving young complainers where there was some evidence of flirtatious behaviour with the accused (case 39 and case 53) it was put to both complainers that the "kissing and cuddling" was evidence of their willingness to participate in sex on the occasion of the charge. Although in the former case this "sexual behaviour" was alleged by the defence to have taken place a few weeks previously (and there was no objection from the prosecution at the use of this evidence), in the latter case it was alleged that the kissing and cuddling had taken place just prior to the sexual activity and this was the subject of an application made by the defence. The application was successful and, in granting the defence permission to pursue such evidence, and investigate the area, the judge said "This goes right to the root of the matter, whether [it is an] act of rape or consensual".

In cross-examination it was put to the 15 year old complainer that she had willingly engaged in kissing and cuddling and had allowed the accused to give her love bites on her neck, but then changed her mind:

Defence: Was it not a case that you were kissing and cuddling ?
Complainer: No
Defence: And that he then wanted to go further and you didn't?"
Complainer: No"
Defence: So everything of a sexual nature was against your will ?"
Complainer: Yes
Defence: And hateful to you ?
Complainer: Yes
Defence: Was it not a situation that you were happy to go to a certain point ?
Complainer: I don't understand. I already told you [no]

And then later in her cross-examination, the defence suggested that she and the accused had had consensual intercourse in the past :

Defence: Has [the accused] ever been to your house ?
Complainer: Before ? No.
Defence: Is it not true that he came to your house and had sexual intercourse with you with your consent as on the current occasion ?

Past sexual behaviour with someone other than the accused was also used by the defence to suggest consent with the accused. In some ways, this is closest to the formulation of a predisposition towards 'automatic' consent that the Scottish Law Commission wished to

outlaw. Again, the study by Brown et al (1993) throws some light on this continuing trend. They found that questions focusing specifically on sexual behaviour between the complainer and someone other than the accused were frequently allowed when the defence made an application to pursue such evidence. In the majority of the cases that they observed, the defence argued that this evidence was relevant to the complainer's credibility and the judge accepted that it was. However, in other cases, the defence wished to pursue such a line in order to show that the complainer had some predisposition to consent on the occasion of the offence.

There were no applications made to pursue evidence on sexual behaviour with others in trials involving young female complainers. However, this sort of evidence was raised by the defence in an absence of an application, most notably in two cases. In the first, the defence tried to construct an image of the consenting young complainer by referring to comments that she had allegedly made concerning her "past boyfriends" and in the second by referring to the "well-known sexual reputation" of the young complainer. The prosecution did not object on either occasion.

Some of the most blatant attempts to construct a picture of the consenting complainer are those 'stories' which depict her as going to (at times, extraordinary) lengths in order to set up a situation where she could have sex with the accused. This has the effect of casting her in the role of conniving young temptress and is most frequently used in conjunction with the typology of *sexual adventuress* as discussed in the previous chapter. In one example of this, the sexual activity that constituted the charge was cast as a case of entrapment of the accused by the young complainer. In a quite remarkable feat of convoluted 'logic' the defence suggested that the complainer had lured the accused into a situation where he had simply succumbed to her seduction techniques. This was a situation where the complainer had gone with her friends to the house of another friend whose parents were out. The accused was also there with friends of his. The defence alleged that the complainer displayed sexually provocative behaviour to the accused all evening and then engineered a situation where the accused was lured to an upstairs bedroom where she lay in wait. This was particularly notable because there was no other evidence from any of the complainer's friends nor the accused's friends (who were all witnesses in the trial) to suggest that any sexually provocative behaviour took place nor that the complainer lured him away to an upstairs bedroom.

Non-Sexual Indicators of Consent

Aside from using specifically sexual evidence to construct stories of the consenting complainer, the defence may also utilise 'indicators' of consent that are not specifically sexual in themselves. This often involved putting forward what appears at first to be a

somewhat spurious list of ways in which the complainer allegedly indicated her sexual interest in the accused. Court observation revealed these non-sexual indicators to be many and varied, and this is not surprising if one remembers that the defence need only 'put' to the complainer (and the jury) alternative versions or interpretations of events. For example, in case 53 cited above, the defence suggested that because the complainer had on the evening in question asked to borrow the accused's bicycle and his cycling gloves then this somehow constituted a subtle sexual overture from her towards him whereby she indicated her consent. In several other cases the defence attempted to put forward other non-sexual 'indicators' such as going into the accused's home when no one else was at home; accepting a lift home with him; accepting something from him - a gift, a drink, chewing gum, a ride in his car or on his motor bike; giving something to him; sending him notes; and going to watch him play sport. All of these 'indicators' are used to 'show' that she tacitly consented. Throughout the trial, the deployment of a particular style of defence rhetoric and one which is resonant with suggestion imbues these non-sexual indicators with sexual connotations, whilst at the same time building up a particular picture of the consenting complainer. The prevalence of stories and presuppositions acknowledges the role that stereotypical perceptions of female sexuality - irrespective of age - play in the court room. This is of course not dissimilar to the way in which sexual character is sometimes built up (see previous chapter). It is the same gradual process of accumulation, using innuendo and suggestion, that is utilised. When stories about the young complainer are deployed in conjunction with images of her as a *sexual being* the presentation of her as someone who is likely to consent is very strongly made. As a result, the experience for a young complainer is as much of a devastating ordeal as that experienced by an adult women.

Why Consent ?

So why are questions of consent such an integral part of such trials ? Is this just a question of the defence mobilising the same forms of questioning and the same well-worn arguments, of running through tried and tested 'rape model' routines with the aim of suggesting that the complainer consented in an attempt to undermine her credibility ? Of course, such lines of questioning and the consequent creation of confusion and/or doubt in the minds of the jury may potentially lead to favourable trial outcomes for the defence (it should be remembered that, in Scotland, there is a third verdict open to jurors, that of Not Proven), and as such may go some way to explain the appearance of consent in these trials. Certainly, in the research interviews defence counsel were quite clear that, during the trial, they try to do their best for their client, which usually means aiming for an acquittal. In this, they are concerned with influencing the jury to reach a favourable outcome for the accused. Impugning the character of the complainer and attacking her credibility and suggesting that she consented may influence quite significantly the

adjudication decision made by the jury in coming to a verdict at the end of the trial. But it is submitted that this is only a *partial* reason for the prevalence of consent-based arguments in trials involving young complainers. A second set of reasons - no less important in terms of potential effects - concern the relationship between the suggestion of consent and the mitigation of the offence. This second possibility is discussed in detail in the next chapter.

CHAPTER EIGHT

THE IMPORTANCE OF MITIGATION

This chapter focuses on the issue of mitigation in sexual offence trials, and draws on mitigation data from the observation of contested trials and also from observed cases where the accused pled guilty and no trial took place. Thirty of the 53 observed contested trials involved a guilty verdict (fuller details of the complex nature of guilty verdicts can be found in Chapter Five) and pleas in mitigation were provided in all of these cases. In addition, pleas in mitigation were given in the 41 observed cases where the accused pled guilty in advance of the trial (called here 'guilty plea' and 's.102' cases[1]). This chapter is about these pleas in mitigation. An examination of pleas in mitigation also throws some light on the paradoxical use of consent-based argument. But before turning to the specificities of the use of mitigation in sexual offence cases involving young women and girls, the following section sets out the process of, and some general characteristics about pleas in mitigation.

The Process and Function of Mitigation

In procedural terms, following the delivery of a guilty verdict in a criminal trial, a plea in mitigation is given by the defence on the behalf of the accused, before the court proceeds to decide sentence. Pleas in mitigation are also given in cases where the accused has pled guilty on the day scheduled for trial. In such cases a conviction is recorded and the plea in mitigation is given after the prosecution has summarised the facts of the offence and given some relevant information about the offender, such as his current circumstances and, if appropriate, any previous convictions and then moved for sentence, and before the court decides the manner of disposal of the case.

The general aim of a plea in mitigation is to seek a lesser sentence. The role of the defence in giving a plea in mitigation is to attempt to draw attention to mitigating factors in the case which lessen the culpability of the offender and/or the seriousness of the offence. These mitigating factors are put forward by the defence[2] in the hope of influencing the sentencing decision by the presiding judge or sheriff and gaining a more lenient sentence

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[1] 'Guilty plea' cases are those where the accused pled not guilty at the preliminary pleading diet, but on the day set for trial pled guilty. Cases heard under s.102 of the Criminal Procedure (Scotland) Act are those where the accused has pled guilty at the preliminary pleading diet, and an 'accelerated' hearing date is set on which to decide sentence

[2] Pleas in mitigation can be made by the defendant where there is no legal representation. In this study, however, all defendants were legally represented and all pleas in mitigation were made by defence lawyers/advocates.

for the defendant. It is essentially a 'plea for clemency' and the judge is urged to take account of the arguments and explanations given, and to view the offender in a more compassionate way. As Shapland (1981) points out in the introduction to her very detailed study of pleas in mitigation the process of mitigation is highly important, both to the defendant and to the public.[3] This process is important to the defendant not only because - if he pleads guilty - it may represent his only experience of how the court operates, but also because of its potential effect on the way in which the court disposes with his case. It is also of importance to the general public because, as Shapland points out, the sentences handed out will often be the only means by which they are able to see how particular offences or offenders are viewed by the courts. However, as is the case with most crimes and offences, sentencers have wide discretion in their choice of sentence for sexual offences (even those which are defined by statute and where a sentencing maximum is given). Walker (1985) maintains that it is because of the lack of an inflexible sentencing tariff that sentencers cannot avoid reasoning in terms of mitigation (or aggravation).[4] Be that as it may, as Ashworth (1992) points out, the judiciary have a discretion to take account of any mitigating factor which is put forward.[5] Of course, that is not to say that sentencers are formally obliged to be influenced by a mitigating plea, they may decide to disbelieve it or regard it as irrelevant, or take the view that it is outweighed by aggravating factors. [6]

In Scotland, crimes of rape, incest and other serious sexual offences carry a potentially substantial custodial penalty. Nicholson (1992) points out that a sentence of three years' imprisonment for rape has been described as "lenient", while particularly aggravating circumstances such as the use of violence, or where the victim is young may justify sentences up to 10 years' imprisonment.[7] Sexual offences other than rape can carry many types of disposal and, although the age-related offences under the Sexual Offences (Scotland) Act 1976 carry sentencing maximums, there is scope for wide variation in sentencing. In all of the cases described here the victim was young and many of the charges were extremely serious, several involving aggravating circumstances such as the use of weapons, breach of trust and abuse of position, and premeditation. The presence of aggravating factors considerably raises the potential for high sentences. Conversely, mitigating factors may diminish the potential for a severe sentence. There are a range of factors which may be influential in the sentencing decision, such as the character of the

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[3] Shapland, J. (1981) *Between Conviction and Sentence* p.1
[4] Walker, N. (1985) *Sentencing : Theory Law and Practice* p.43
[5] Ashworth, A. (1992) *Sentencing and Criminal Justice*
[6] Walker, N. (1985)
[7] Nicholson, C.B.G. (1992) *Sentencing ; Law and Practice in Scotland* (2nd ed.) 11-35 p.246

crime, the degree of harm done, the level of provocation, the effect of drink or drugs, and background information about the offender, including past convictions.[8] Any of these factors could influence the sentencing decision as mitigating or aggravating circumstances, depending on the facts of the case. Pleas in mitigation are therefore important in that they present an opportunity for raising for consideration those factors which may influence sentencing in a way that is favourable for the offender.

Pleas in mitigation take the form of what can be seen as an explanatory speech by the defence which essentially gives an account of the offence, outlining the defendant's point of view. An explanation, or sometimes what amounts to a justification, of the offence may be offered. Such speeches also usually include information about what type of person the defendant is, what his social and familial circumstances are, and also what his intentions may be concerning his future. This may take the form of a potted life history or may be a selection of what may be considered significant factors from the defendant's current or past life. Putting forward this information in mitigation serves several purposes. The information may serve to fill in any gaps or inadequacies in the information provided by others, that is, the prosecution in giving the facts of the case in guilty pleas, and others who have provided information and views about the offender. It provides a means for portraying the defendant in a more sympathetic light. More specifically, such information is conveyed as important for the consideration of sentence. As such, some factors highlighted by the defence in mitigation are designed to 'key in' to certain elements in sentencing. To provide, for example, a means by which the sentencer can assess the relative appropriateness of different types of disposal. Certain factors can fulfil many functions. For example, information concerning the defendant's social and/or familial circumstances may be pertinent for assessing the defendant's chances of rehabilitation. It may also be a measure by which the sentencer is able to appraise the effects of a severe sentence on the defendant's dependants, which may also be an element in sentencing.[9]

With regard to the actual offence in pleas in mitigation, there is no dispute about the objective 'facts' of the case - that is, what occurred and who did it - these 'facts' have either been agreed or proved in that the defendant has pled guilty or has been found guilty after the evidence has been heard in a trial. But what is frequently in contention is whether the defendant *meant* to do it in quite the way that it happened or whether the offence occurred in quite the way that it is construed by the court, and also *why* the defendant did it. In a

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[8] Nicholson (1992) 912 - 939, p.182-192

[9] Walker (1985) terms the minimisation of "hardship for innocent members of the public" a 'second order' sentencing aim, and gives as an example the (exceptional) case in which mothers of young children are excused the normal prison sentence in order that their children need not be cared for by strangers. 8.46 p.120

sense then, some of the information given in pleas in mitigation is not about 'facts' which are already known by the sentencer as a result of the trial or, in guilty plea cases, as a result of the details of the offence laid out in the indictment and summarised by the prosecution in advance of a plea in mitigation, but about aspects of the defendant's motivation and hence about 'facts' known only by the defendant. Pleas in mitigation also provide an opportunity for ascertaining the subsequent feelings of the defendant about the offence, for example whether he is remorseful, whether he realises or accepts that what he did was wrong. Taken together, this information is intended to mitigate the offence, and the mitigation speech is an (often blatant) attempt to persuade the sentencer to pass a lenient sentence. Because a plea in mitigation is an arena in which the defendant's point of view can be put forward, it can be perceived as a very 'defendant-oriented' process. It is the thoughts and statements and perspectives of the defendant which are frequently of significance here (albeit as mediated by the defence), and hence pleas in mitigation are constructed around information provided by the defendant.

One important point to be borne in mind is that the formal rules of evidence that pertain in a contested trial do not apply in a plea of mitigation. Mitigating factors are different from evidential facts which go towards proving or disproving the case. So, for example, there are no rules for excluding evidence,[10] and no real concern about admissibility or relevance. Essentially this means that the defence is able to muster mitigating arguments and present them more or less without constraint, and it appears that - subject to judicial discretion - 'anything goes' in mitigation. This freedom to introduce any factor consequently raises the difficult and thorny issue of the reliability of pleas in mitigation. The defence will derive most of the information for the plea in mitigation from the defendant (although this may be revised in the light of evidence which emerged during the trial), and none of this is subject to any form of proof. In the English context, it has been contended that there is "wide scope for unchallenged cock-and-bull stories to be put forward in mitigation"[11] - particularly in those cases where the accused has pled guilty and there is no contested trial and hence no witnesses heard in court. The question of the reliability of the information provided in mitigation is also something which is raised by Shapland (1981) who points out that information about the offender's personal circumstances can present difficulties in terms of reliability. Questions that arise as to the reliability of information about the offender's personal circumstances concern the correctness of the original information given by the offender, the manner in which that information is obtained, the time that may have elapsed between collecting the information and presenting it in court, and the amount of

[10] Although the Scottish Law Commission did consider extending the "shield" legislation to cover pleas in mitigation, it was ultimately rejected by them.

[11] Brayshaw, A.J. (1982) 'Guilty, But ....' *The Magistrate*

original (or new) information that is actually given in court.[12] Given the number of stages of information collection and the range and diversity of possible factors which may affect what is ultimately said in mitigation, the reliability of the content of mitigation speeches remains an open question.[13] There is a procedure by which prosecutors can object to what is led in mitigation, but this appears to be followed only where there is a significant dispute about the mitigating factors. In such cases, which by all accounts are extremely rare, the matter can be settled only by hearing evidence. No cases were observed in which this procedure was followed.[14]

A second important point is that although pleas in mitigation follow a standard procedure, they are not structured by strict procedural rules which emanate from case or statute law which govern the format or the order in which information is presented.[15] Hence, pleas in mitigation differ in several respects from contested trials. But there are some similarities which such pleas share with the trial situation. Frequently, mitigation speeches will incorporate several lines of argument, encompassing any factors that are considered by the defence to be extenuating to the case. This mirrors the trial situation somewhat in that defence lines of argument are often multi-track, incorporating a number of strands. However, because the defence is able to bring to bear a wide and diverse range of mitigating factors, pleas in mitigation often have something of a 'rag bag' quality to them. There is another similarity between pleas in mitigation and contested trials in that what is stated in mitigation is often a reiteration or re-casting of defence arguments led in criminal trials, and this can be seen most vividly in those cases where a guilty verdict is returned. As such, many pleas in mitigation provide a clear 'snap-shot' picture of defence questioning and argument in contested trials.

As stated earlier, mitigating factors typically relate to the offender - that is, his reasons for the offence, his attitude towards the offence, his personal circumstances. These factors provide a context - be it social, familial, or circumstantial - within which the offender and the offence can be defined and located and hence made more explicable. Shapland (1981) found that pleas in mitigation typically produced several mitigating factors which could be grouped together into certain categories. The groups of mitigating factors most frequently mentioned were :

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[12] Shapland (1981) p.123

[13] Ashworth, A. (1983) p. 424

[14] Furthermore, none of the prosecutors and defence lawyers/advocates interviewed were aware of any case in which this procedure was used.

[15] Shapland (1981) p. 1

a. the reasons for the offence (i.e. factors such as provocation, suddenness and financial crisis, or emphasising unusual or atypical circumstances);
b. the gravity of the offence (especially presenting the offence as a relatively minor manifestation);
c. the defendant's attitude towards the offence (in particular any form of contrition or remorse);
d. his personal circumstances at the time of the court appearance (especially employment);
e. future personal circumstances (support from his family), and;
f. past record (emphasising in particular the absence of previous convictions or a long gap since the last offence).[16]

Shapland thus organises the mitigating factors identified in her scrutiny of pleas in mitigation into categories reflecting which aspect of the offender or the offence they were describing.[17] In using this categorisation, she focuses on features of the offender and the offence rather than the bearing that such features may have on sentence. In analysing the pleas in mitigation in this study, a different type of categorisation of mitigating factors has been employed. Whilst the analysis of pleas in mitigation showed a number of strong similarities to that found by Shapland, there were also some considerable differences, most notably due to the fact that, first, in this research the offences to which the pleas in mitigation related were all sexual offences involving young complainers and thus of a particular 'type', sharing a number of similarities; second, there was a predominant use of particular mitigating factors in this study; third, the pleas in this study were characterised by the frequency and explicitness with which the defence related particular factors to the issues of culpability and seriousness; and fourth, there was much more of a focus on the victim. These differences necessitated a different type of categorisation from that developed by Shapland. This categorisation will be described in the following section.

Mitigation In Sexual Offences : The Research Data

Characteristics of the Observed Pleas in Mitigation

Observation of the 71 pleas in mitigation which form the research data discussed here identified several prevalent lines of mitigation, many of which centred on the perspective of or conditions personal to the offender. Expositions of the offender's past, and his present circumstances, such as his physical or mental health or emotional state at the time of the court appearance and also at the time of the offence were commonly used in an attempt to

[16] ibid. p.55-70
[17] ibid. p. 55

offer some explanation or rationale for the offence. Along with other sorts of considerations such as the role of alcohol and unemployment in the commission of the offence, the remorse expressed by the offender for having committed the offence, and other factors such as the wider social contributions he has made in the past (or may make in the future), the inappropriateness of a custodial sentence, and the probable deleterious effects of a severe sentence on the offender and/or his family were used as part of a general mitigation routine. In this way, analysis of the pleas showed strong similarities with those documented by Shapland (1981). Cited either singly, or in combinations, such factors were presented as providing a context for locating the crime in relation to the offender. Many of the factors that were mentioned are generic to all pleas in mitigation, commonly occurring as explanations or reasons in relation to a wide range of crimes and offences, and not necessarily confined to those offences with a sexual element. This is perhaps not that surprising, however, given that mitigation frequently focuses primarily on information pertaining to the offender, his motivations, his circumstances and his attitude towards the offence, more so than on the actual offence.

Focus on Complainer

Court observation also suggested that pleas in mitigation in sexual offence cases show some fairly distinct characteristics, and this is particularly so in relation to the reasons given for the offence. In addition to the expected offender-specific information, there was in fact a great deal of information given about the *complainer* in mitigation speeches given in relation to the sexual offences. What was particularly interesting was that many of the arguments put forward by the defence to mitigate the seriousness of the offence, and also the responsibility of the offender, were reflective of those that appear in the cross-examination of witnesses (especially the complainer) in contested trials. In these cases, the 'snap-shot' picture analogy is particularly apt. The mitigation 'snap-shot' provides an indication of what occurs in defence cross-examination, but without any of the formal rules of evidence that would be necessary in a trial. Of course, this can only be truly validated and shown to be the case in relation to the contested trials where the arguments had already been well-rehearsed, and where the content of mitigating speeches could be 'matched' with arguments in the trial. But it is argued here that in 'guilty plea' and 's.102' cases where there has been no trial, and where no evidence has been led prior to mitigation, the defence arguments and strategies resemble, albeit in a condensed form, how things would have operated in a trial setting if the defence were similarly unconstrained in the cross-examination of witnesses. Whilst pleas in mitigation were perhaps not characterised by the same degree of invective as many defence cross-examinations, less than subtle criticisms were levelled at the complainer, typically alleging provocation or culpability or some form

of misconduct by her which precipitated the offence. The young complainer was typically portrayed by the defence as provocative and precocious, as a sexual being, as someone who consented to the sexual activity - again more or less replicating the presentation of the complainer in contested trials. As in the trial situation, factors such as the complainer's sexual knowledge and physical maturity, her previous sexual experience, her delay in reporting the offence, lack of injuries and general casting of aspersions as to her innocence in relation to the offence are all brought up, to imply that the offence was less serious and/or she was at least partly to blame for what happened.

There was also a very strong focus on the issue of consent. So much so, that the presentation of the consenting young complainer appeared to dominate pleas in mitigation in the same way that such presentations dominate contested trials. Pleas in mitigation resemble contested trials in that there is a focus on the complainer and on specific features or aspects, particularly the sexuality of the complainer. This was an early indication that in addition to sharing certain similarities in terms of the type of evidence which receives most attention, pleas in mitigation and contested trials may also share common purposes. In Scots law it is competent to lead evidence of mitigating circumstances in the course of the trial, and the striking similarity between pleas in mitigations and contested trials raises the question of whether the focus on the complainer in the trial is not in fact a means of introducing mitigating factors. This possibility will be explored in more detail later in this chapter.

Offering Alternative Interpretations

The observed mitigation speeches also demonstrated other elements which showed distinct similarities with defence strategies typically found in sexual offence trials - which appear to be deployed in order to diminish the culpability of the offender. The defence commonly offered alternative interpretations of the facts or circumstances of the offence in mitigation. In cases where guilty verdicts were returned, this was in fact a reiteration of what was argued in the trial, although in a small number of cases there was some inconsistency in that the alternative explanation given in mitigation was 'new', as it were. In the 'guilty plea' cases, the relaying of alternative interpretations was done seemingly in an effort to convince the court that the offence did not occur in the way that it may have appeared from the prosecution summary of the facts of the case.

Offender As Victim

Another characteristic of the pleas was an overtly sympathetic portrayal of the offender Many of the pleas typified the offender as a 'victim' of circumstance, either as someone

whose troubled past or present was to blame for the offence or, somewhat more frequently, as someone who was tricked or misled into having sex by the complainer. Although the focus on the offender is not dissimilar to that found generally in mitigation, in a sense regardless of the type of offence, these cases were notable for the fact that the complainer was presented as particularly sexually predatory.

The factors utilised in mitigation in the 71 cases will be described in the following section, and an attempt made to identify the contexts which these factors represent. As previously stated, the categorisations of mitigating factors employed here are somewhat different to those used by Shapland (1981), although essentially they cover very similar territory. The pleas in mitigation in this research are notable in that typically the defence prefaced any mention of a mitigating factor by stating the *bearing* that the factor had on a specific sentencing issue or consideration - usually the factor was related to the seriousness of the offence, or to the culpability or responsibility of the defendant, and sometimes both. For this reason, the factors are categorised in terms of whether they bore on seriousness or culpability. They were also other factors, which were not directly related to seriousness or culpability by the defence, but were introduced, usually, to show good character on the part of the offender. Whilst the overlapping functions of the mitigating factors should be borne in mind, the following sections attempt to deal, respectively, with those issues which were used to minimise seriousness of the offence and those which lessen the culpability of the offender. A third section covers those mitigating factors which are used in a more general way, to suggest good character on the part of the offender, and to convey the inappropriateness of a severe sentence for the offender.

Mitigating Seriousness of the Offence

Although the offender has pled or has been found guilty of an offence as charged, it may be that he feels it to be less serious than depicted by the prosecution. In such cases, mitigating factors are given in an effort to show the offence to be less severe than it may seem. Shapland (1981) found that the category of factors relating to the seriousness of the offence formed a small part of the total number of mitigating factors mentioned. Although there are significant differences in the methodology employed, the research findings under discussion here are somewhat different to Shapland's in that factors mitigating severity of the offence formed a substantial number of total mitigating factors. Whilst there is some overlap between those factors which apply to the offender's culpability, and those which relate to the seriousness of the offence, some factors such as the role played by the offender - or the victim - in the offence, the degree of harm levelled at, and injury sustained by the

complainer, her relationship with the offender, and her previous sexual experience were factors which were more regularly used to mitigate the seriousness of the offence.

Frequently - in the guilty plea cases - it was stated that the offence did not happen in the way that it appeared to from the prosecution summary of the case. Usually it was said that the offence did not occur in the way in which the complainer described it. Her account of the offence was said to be inaccurate in some way. It was also common for the defence to state that the defendant felt the offence to be much more minor than it appeared to be. This comes close to the manner of dispute in the trial, in that the defence puts forward an alternative version of events - re-interpreting the prosecution summary and drawing on factors such as the complainer's sexual character, her relationship with the offender and other factors to flesh out the alternative version.

Previous Sexual Experience

Present in mitigation is the presumption that the sexual assault of young women and girls with previous sexual experience is less serious than with those who are sexually inexperienced. Consequently "The complainer was 16 and not a virgin ... she was a willing party ... She had been in hospital for an abortion the week before [the incident]" (case 94 - s.102); "She had experience of sex" (case 77 - guilty plea); and the somewhat bizarre "[He] had seen the girl sexually involved with the family dog when he watched her through a hole in the ceiling" (case 72 - guilty plea). By raising such matters in mitigation the implication is that when a young complainer is not totally innocent before the offence, then the seriousness of it is somehow diminished. It was here also that reference was made to the complainer's advanced physical development or sexual maturity. Implicit within such statements is that sexual maturity in a victim somehow excuses the offender and reduces the seriousness of the offence.

Delay

Many of the offences, particularly those where the offender was in a position of close relationship, took place over a number of years. Often several years elapsed before the offences came to light. As in cross-examination during the trial, in the majority of these cases the fact that the complainer delayed telling someone about what was happening was presented as a confirmation of her willingness to participate in the sexual activity. She was not a hapless victim, but an eager participant and thus the seriousness of the offence is substantially reduced. "The girl enjoyed it as she didn't report at all and it occurred over a long time" (case 56 - guilty plea); "It was a social worker who reported the case to the police when her suspicions were aroused. The girl was unconcerned as she did not report it" (case 69 - guilty plea). In one case (case 72) where there was a long delay in the offences coming to light, the charges of

incest, unlawful sexual intercourse and lewd and libidinous practices were described as being "stale" and as "having taken place in the distant past" and as "having little bearing on the present relationship between the defendant and his daughters." Interestingly, in none of the guilty plea or s.102 cases was there any attempt by the prosecution to suggest possible reasons why the complainer did not tell anyone or report the offence. The literature on child sexual abuse abounds with accounts of the reaction of children on experiencing sexual assault, particularly when the perpetrator is a loved one or an authority figure. Keeping quiet about the abuse is, on the contrary, a 'normal' reaction of children due to their confusion, guilt, fear or embarrassment about what has occurred. Yet the defence interpretation of delay is rarely challenged either in the trial situation or in pleas in mitigation.

Physical Injury and Psychological Damage

Physical injury sustained by the complainer is a major determinant in assessing the gravity of the offence. Lack of injuries is taken to denote lack of violence and thus the offence is depicted as not as serious as it might have been. Lack or denial of injury in mitigation is common to many sorts of criminal offences, and not restricted to sexual offences. Yet in the observed cases, denial or minimisation of injury was very common, given as a factor in three quarters of cases. It also took a number of forms. Typically, mitigation focused on the general lack of physical injury, for example "There was no physical damage to the child" (case 56 - guilty plea); "There was no damage done - no harm to the girl" (case 61 - guilty plea); "No injury sustained by the complainers" (case 67 - guilty plea), although in a small number of cases, mitigation focused on lack of specific genital injury, for example "There was little damage done as the penetration was minimal" (case 58); "The girl will not suffer physically in later life as a result of the intercourse" (case 84 - guilty plea).

Mitigation also frequently focused on the lack of physical violence used by the offender, for example, in approximately one third of the cases it was said that the offender " ... used no violence at all". Similarly, in about a quarter of the cases it was stated that the offender was "not dangerous" because of this lack of violence. The focus on lack of injury, force and violence is part of a wider problem regarding the status of force and injury in relation to sexual offences. This has already been discussed in Chapter Seven but still bears repeating here. There continues to be a pervasive view among some legal practitioners that only the presence of injuries provides sufficient evidence that a 'real' and serious sexual offence has taken place. Where there is no injury, then the seriousness of the offence is diminished. Again, this is something that is not countered or contradicted by the prosecution in mitigation .

In six cases, there was a specific denial of long-term psychological damage to the victim. This was interesting in that there had been no mention of this possibility in either the trial situation (three of the six cases were contested trials where a guilty verdict was returned) nor in the prosecution summing up prior to mitigation. It appeared as if this factor was given in mitigation to repudiate any suggestion or thinking by the judge that the complainer may have been psychologically scarred by the sexual activity. By pre-empting the judge, as it were, the defence attempts to clear up any possibility of doubt concerning the possibility of long-term damage. It is important to note that the basis for the denial of psychological damage was always unclear as there was never any reference to reports or assessments undertaken by psychologists or psychiatrists used to back up the defence statement.

Relationship Between Complainer and Offender

Another factor which was regularly used to mitigate seriousness was the relationship between the offender and the victim. This was particularly so in non-incest cases. There appears to be a presumption that where a blood relationship exists then this exacerbates the offence. In half of the cases which did not involve a blood or affine relationship between the parties, it was stated in mitigation that there was no close relationship between them, for example "She was not a blood relation of his" (case 91 - s.102) and the lack of close relationship made the offence less serious than if there were.

However, the relationship between the victim and offender could be put to use in a number of different (and often contradictory) ways. In non-incest cases, the fact that the offender had known the victim for some length of time was also used to lessen the seriousness of the offence. Here the implication is that the offence is less serious than if it was perpetrated by a complete stranger, "He cared for her and did not harm her, they had a close relationship and [the complainer] wanted it to continue" (case 59 - guilty plea).

Mitigating Culpability

Displacing Blame

The degree of blame, that is how much should be attributed to the offender or other factors, and how much he accepts blame, featured significantly, in mitigation speeches. In most of the observed cases, that is, in all of the 'guilty pleas' and 's.102's' and, somewhat surprisingly given that all evidence had been heard, the majority of guilty verdict cases, there was always a strong indication given by the defence as to who - or what - was *primarily* to blame for the offence. In many ways this bears similarities to the 'techniques of neutralisation' put forward in a classic sociological formulation by Sykes and Matza

(1957). These 'techniques' are essentially linguistic constructs which make an appeal to special mitigating circumstances and at the same time offer justifications for an offence, for example, the 'denial of responsibility'('I didn't mean it', 'something/someone else was to blame') and 'denial of victim' ('she had it coming')'[18]

In the 'guilty plea and 's.102' cases the offender acknowledged guilt by the act of pleading guilty. However, the degree of culpability is an important consideration for appropriate sentencing[19] and is therefore of consequence in mitigation. Similarly in cases where the offender was found guilty, culpability is still an important issue. In all cases there was an attempt to displace at the very least some portion of the blame away from the offender, although the extent of this differed from case to case.

In general, two distinctive strands of 'blame displacement' emerged from the observation of cases. On the one hand, there were those cases where blame was, for the most part, rejected by the defendant and attributed directly to someone else, usually the complainer, but in some cases this was a significant other person, usually another woman - the offender's wife, partner or, as in two cases, the offender' s mother. On the other hand, there were those cases where fuller blame was accepted by the offender, although in these cases there was always additionally present some other strong mitigating factors which combined to dilute that which was directly attributable to the offender. These additional mitigating factors were usually social or psychological circumstances in the offender's past history or situation at the time of the offence.

By looking more closely at the type of offence, it is possible to identify those strands more clearly. In general, it would seem that blame displacement occurred more frequently in those cases involving rape, rape-related, and non-incest statutory charges,[20] particularly those involving adolescent complainers. In such cases, the first strand of blame displacement was more pronounced, in that the pleas in mitigation were more frequently characterised by a fuller rejection of blame by the offender. Criticisms were levelled more directly at the complainer's lifestyle and her character, and attempts were made to cite her behaviour and demeanour as 'causal' factors, either leading directly to, or else contributing in some way to the offence. Although the offender is legally at fault, metaphorically an accusatory finger is pointed directly at the complainer, in an attempt to alleviate the offender of much of the blame. In such cases, although consent was not technically an issue

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[18] Sykes, G. and Matza, D. (1957) 'Techniques of Neutralisation : A Theory of Delinquency ' *American Sociological Review* vol. 22

[19] Walker (1985) p.48

[20] As charged under sections of the Sexual Offences (Scotland) Act 1976

in relation to the offence, the typification of the complainer as consenting and provocative was particularly evident.

The second strand of blame displacement was more evident in those cases where there was a close (or longer term) offender-complainer relationship, that is, in those cases which involved incest or incest-related offences, and especially those which involved more than one complainer. In such cases, although the offender publicly (via his defence) accepted fuller blame for the offence, a range of social and psychological factors were also drawn upon to explain or justify what occurred. It is important to point out that a high proportion of incest and incest-related cases involved a plea of guilty by the offender. Consequently the majority of those cases where the offender accepted fuller blame for the offence did not involve a contested trial. The finding that offenders accepted fuller blame in cases where a guilty plea had been given was initially somewhat surprising, as one may expect that - given the doctrine of 'anything goes' - the relative scope for displacing blame onto the victim in mitigation would be increased where no evidence had been previously led. This did not turn out to be the case, and in fact it was in those cases where evidence had been led that attempts to displace blame onto the complainer were most vociferous (and this issue will be returned to later in this chapter).

Provocation

The offender's culpability is often regarded as diminished if the victim is regarded as responsible for provoking the offender into the behaviour which is the subject of the charge.[21] As in Shapland's study, provocation was put forward in mitigation as a reason for the offence. But whereas the defendants in Shapland's research cited a range of factors which provoked them into the offence, such as old grievances against the victim, or that the situation itself offered irresistible temptation, what was noticeable about the cases described here was the strong emphasis placed on how the complainer had *tempted* the offender into the sexual activity. The amount of information proffered about the complainer in pleas in mitigation was considerable. Mitigation commonly focused on the complainer as, in the words of the defence, "sexually provocative" or "actively encouraging" and willing to participate in sexual behaviour. Such depictions of the complainer mirrored those found in contested trials. Consider the following examples : "She hung around him constantly, and kept returning to the house ... she was flirtatious in the way that only very young girls can be." (case 11- guilty verdict); "The girl's sexual provocation gave encouragement" (case 59 - guilty plea); "She welcomed his advances and met them all the way " (case 69 - guilty plea); "The girl began to visit him in his room

[21] Walker (1985) cites the case of *Wilbourne* (1982) 4 Cr App Rep (S) 163 whose daughter seduced him into incest.

... she clearly consented and even took time off school to be with him" (case 79 - guilty plea); "She never resisted ... she actively encouraged him" (case 77 - guilty plea) . Depicting the young complainer in this way clearly raises the issue of provocation, which is acknowledged to be favourable for mitigation. The general inference is that the complainer was a willing party, that in some cases she initiated the sexual activity. Hence, not only does the description of the tempting, provocative complainer provide a justification or rationale for the offence, but it also implicates the complainer in the actual commission of the offence - thus acting as an effective mechanism for the displacement of blame away from the offender. This issue of provocation also implies that the offender has been provoked or pushed beyond the limits of endurance, that he lost his self-control as a result of the actions and behaviour of the complainer.

Defence assertions regarding the complainer's awakening sexuality are followed through into mitigation, and the notion of awakening sexuality commonly formed a context in which to suggest that the offence was the result of sexual exploration on the part of the complainer to which the offender simply succumbed. This also provides a rationale for the offence, and again, the inference is that the complainer is to some extent responsible. 'Wantonness' is often combined with 'deviousness', hence the 13 year old teenager whose mother cohabited with the offender "initiated the behaviour and insisted that it continue ... she said she would make a better mother for his children than her own mother" (case 91 - s.102).

'That Kind of Girl'

There was a clear focus on the sexual character of the complainer and also the issue of consent. The presentation of the complainer as 'that kind of girl' was also frequently given in pleas in mitigation (12 cases). Statements such as "The girl has long caused problems to her family ... she associates with young men ... she has indulged in sex play with boys from school" (case 77 - guilty plea) were used to connote a strong image of the complainer as someone whose behaviour demonstrates a generalised tendency to (indiscriminate) consent. Of course, this kind of mitigating factor is used to lessen seriousness of the offence as well as the culpability of the offender. This sort of depiction of the complainer is markedly similar to that put forward in contested trials, although of course no previous evidence concerning the complainer's character had been led. It is perhaps unsurprising that similar arguments and rationales about the event and what occurred between the offender and the complainer which had been aired earlier by the defence during the trial were reiterated in mitigation. It was however, those cases where there had been no trial which proved particularly illuminating. In such cases, the consenting young complainer was presented 'ready made'. Stories about the events, and characterisations of the complainer as a 'sexual being', as

provocative, as consenting to the sexual behaviour very closely resembled those found in contested trials. The same sort of sexual and non-sexual indicators of consent are stated, as a way of demonstrating that the offence is less serious and/or the offender is not entirely to blame.

Similarly, as in contested trials, information that casts the complainer in a detrimental light was frequently drawn upon. The following provides an example of this, "The complainer is a troublesome child, she has a history of truancy from school and a history of theft .. she has been up before the Children's Panel ... she has been to many community carers and foster parents ... all of these factors affect her reliability" (case 77 - guilty plea). Of course, in this example, by additionally commenting on the complainer's questionable reliability the defence is also suggesting that her account of what occurred may not be accurate. The 'wild child' figure appeared in almost a quarter of cases (16) displaying a variety of behavioural defects, ranging from drug-taking, glue-sniffing, truancy, thievery, street-fighting, bicycle-stealing, trouble-making, bullying, and general dishonesty. At the same time as casting the complainer's character in a dubious light and thus raising the question of her general reliability and the accuracy of her account of what occurred, this type of mitigating factor also provides a means of displacing blame away from the offender, and reduces the seriousness of the offence - the implication being that sexual activity is just another part of her repertoire of disreputable behaviour. There is also the unavoidable implication that uncontrollable bad girls are less worthy of the law's protection than those who are good and innocent and chaste.

As previously mentioned, there was a strong focus on the issue of consent. Very commonly it was explicitly stated by the defence that the girl had consented to the sexual activity. Of course, in guilty plea cases there has been no evidence led, and often this statement was not backed up by any other information. Where other 'substantiating' information was given, this was commonly along the lines that the complainer was sexually active, sexually experienced, had been 'in trouble', was sexually or physically mature etc.. In several cases, although it was not specifically stated that the complainer had consented, the defence offered the more oblique "she is close to the age of consent". This is intended to convey to the sentencer that the complainer was almost of the age in which she could consent - indeed she may well have consented. In the words of the defence this reduces the seriousness of the offence. Yet, the presentation of the consenting, provocative complainer is often used to diminish the offender's culpability.

Personal Circumstances : The Past

Information about the offender's past history and/or domestic situation at the time of the offence was frequently used to explain the offence and also to lessen his culpability. In all cases there was some (albeit in some cases very brief) discussion of the offender's past. A common line used was what Shapland calls the 'hard luck tale'[22] where adverse personal circumstances are given as reasons for the offence. An unhappy childhood, a deprived family background, a history of abuse as a child, are contexts within which the offender is presented as suffering from effects and influences which led to him committing the offence(s). Seemingly, implicit within this form of mitigation is a loose reliance on the tenet that a problem background can account for problem behaviour. This was widely used in the construction of a history for the offender. A broken home, parental neglect, physical and sexual abuse, material deprivation and emotional stress leading to insecurity and social withdrawal were, on the one hand, cited as sources of anxieties or needs forming the context within which the offender (and the offence) is better understood , but were also used, on the other hand, as a means of detracting from the culpability of the offender. These accounts provide reasons for the offence. For example, "[He] had a tragic background ... was subject to frequent batterings ... spent seven years in a Children's Home ... has always stayed in temporary accommodation ... is unable to form relationships with people" and "[He] was abandoned as a baby in a bus station in Glasgow ... he has been fostered 20 times and has never had a stable home" (case 75 - guilty plea). The unhappy past of the offender is presented as somehow to blame for the offence. In mitigation, the story is one where the cruel circle of childhood deprivation takes its toll in later years, manifesting in offending behaviour. But, as Shapland points out, a bad social history is not considered by the law to provide any defence to a criminal charge and so is no excuse for an offence.[23] The reason for this is that difficult circumstances not present at the time of the offence or court hearing are thought by law not to affect the individual's responsibility for the offence. However, where Shapland expressed some surprise that in her study there were so few mentions in court of the broken homes and turbulent marital relationships of offenders, in this research, these sort of adverse personal circumstances were among the most frequently mentioned to mitigate culpability, despite them not really carrying any weight in terms of the offender's responsibility for the offence. There may be several explanations for this. One may be that the defence does not know in advance what the sentencer will take into consideration. Another explanation may be that such factors are considered to have a bearing because of

[22] Shapland, J. (1981) p. 68
[23] Shapland, J. (1981) p. 68

the specific nature of sexual offences involving young complainers. The use of such factors is indicative also of the licence that the defence has in mitigation.

Accounts of childhood deprivation were frequently coupled with a history of sexual abuse. For example, "[He] lived as a beggar in Spain ... there is a history of such [sexual] behaviour in his family ... he was a victim of it himself" (case 74 - guilty plea). This presentation of the offender as a victim is not uncommon. It implies a breaking down of the distinction between victim and offender. In the next example, the mitigation speech consisted of a long narrative account of the appalling past history of the offender, of which the following is just a small excerpt. "The explanation for the offence is a combination of bad relations with his wife and his past history with his father, who [sexually] abused him from a young age. He envisages his father as the source of his problems. The behaviour of his father continued until he was 27 years old. He thought it was the correct way to behave." (case 89 - s.102) In this case, the defence systematically and quite skilfully interspersed the story of past abuse and deprivation with named individuals who were apparently indirectly responsible for the current offence. These individuals, in particular the offender's wife and father, and the two young victims, but also his mother and his brothers and sisters, and his primary school teacher were all seen as blameworthy. Throughout the mitigation speech the defence shifted blame for the offences away from the offender, and dispersed it among a wide range of significant others in the offender's life. This type of scatter-gun approach was fairly rare in the observed cases, in that the displacement of blame was usually a much more focused affair - pinpointing the complainer or sometimes the offender's wife as ultimately responsible.

Personal Circumstances : The Present

The offender's domestic situation at the time of, or just prior to, the offence were frequently used as an explanation for the offence. Abnormal, fraught or difficult family circumstances were used as part of the denial of total responsibility. Sometimes the implication is that the criminal offence was a *temporary aberration*, that the offender would never normally behave in such a way, that he would never have committed the offence but for pressure stemming from his immediate domestic situation, that he had temporarily "gone off the rails." This type of argument is also indicative of the wide licence available to the defence in mitigation, as it is often in direct contradiction to other factors - particularly when the sexual activity had taken place over a number of years.

Breakdown of marital or cohabitee sexual relations was given in mitigation in 15 of the cases in which the offender had pled guilty and in seven of the cases where a guilty verdict was returned. Here, the sexual activity with the victim was said to have been initiated

because of the stresses and strains of a rocky relationship "when his wife moved out to live with another man" (case 90 - s.102) ; "when his marriage had broken down and he was at the lowest ebb of morale and self-respect" (case 70 - guilty plea); "[He] was a very unhappy individual, upset and emotional at the time as his marriage had broken down" (case 73 - guilty plea).

Particular emphasis was given to those circumstances where sexual relations within the marital or cohabitational relationship had ceased. This was presented as the time when the illegal sexual activity commenced, for example, "when his wife went in to hospital for a hysterectomy" (case 92 - s.102) "when his wife developed gynaecological problems and sexual relations between them deteriorated" and "when his wife gave birth to their first child." In one notable case the defence addressed the judge thus: "You have heard of the expression '*she is like a refrigerator*' - well, he maintains that his wife was like a deep-freeze, and so he turned to his daughters for comfort" (case 89). In other cases, the burden of single parenthood after bereavement "The behaviour commenced just after the tragic death of his wife" (case 93 - s.102), or the pressure of single-handedly having to care for the children whilst his wife was at work "leaving him at home with the girls" were depicted as factors in mitigation. The suggestion here is that unloving, frigid or preoccupied partners are responsible for 'pushing' the offender into the offence. It is their 'unloving' behaviour or attitude towards the offender that is said to have triggered off and, in some cases, caused the sexual activity to be sustained, thus explaining the offence and enabling part of the blame to be shifted from the offender.

Social inadequacy on the part of the offender was cited in several cases as a reason for the offence. In case 65 the offender was just 17 years old, and the mitigation speech focused primarily on his sad childhood, how he had been bullied at school, became increasingly socially withdrawn, had never had a relationship with a member of the opposite sex, and had difficulty making friends. He had been charged with chasing after two 12 year old girls, abducting and then assaulting them with the intention of raping them. He was armed at the time and so was also charged with two contraventions of the Firearms Act, as well as with a contravention of his bail order from a previous offence. He pled guilty to the firearms charges and to assault only (which was accepted by the prosecution). In mitigation the defence attributed the offences to his "extreme social inadequacy", stating that he had chased the complainers spontaneously because he wanted to ask them to help him shoot at targets, and he attacked them out of fear when they started screaming, and that there was no sexual motive in the attacks at all.

There appears to be an assumption that age is an important factor in the consideration of leniency. The defence made much of the age of younger offenders, who were generally

presented as less responsible for their behaviour than older offenders. Certainly in those few cases where there was in fact only a relatively slight difference between the offender and the complainer, there were pronounced assertions by the defence that the offender's immaturity was a contributory factor.

It was at first somewhat surprising to find that an *uncontrollable sex drive* on the part of the offender was given in mitigation in only a very few cases. Given the popular mythology surrounding sexual assault - which tends to place a rampant and indiscriminate sexual urge on the part of the offender high on the list of motivating factors, it would not be unreasonable to expect offenders to instruct their defence advocates that this in fact was a reason for the offence. In her study of rape trials at the Old Bailey, Zsuzsanna Adler (1987) found it to be a main mitigation factor. [24] One explanation for its omission here may be that the offences all involved young complainers, and mitigation tended towards an emphasis on the roles of past or present social and domestic factors, and/or on provocative overtures by the complainer. In general, a predatory predisposition on the part of the offender was denied. In the two cases where sexual drive was overtly mentioned, it was introduced as part of a deeper psychological problem of the offender which manifested itself in sexual difficulty. In both cases the offenders were over 60 years old, and had a long history of such offences and a lengthy list of previous analogous convictions. Both had previously received psychiatric treatment, including drugs to reduce their sex drive, and mitigation focused on their loneliness, depression and bewilderment as to why they behaved in such a way.

In other cases, although sexual drive was not mentioned explicitly, it was implied. For example, in the case cited above where the offender's wife was described as a "deep freeze" (case 89), and in those cases cited earlier where the offender had turned towards the complainer when 'normal' sex with a wife or girlfriend was thwarted.

Mental and Physical Impairment

Although a bad social history is no excuse for a criminal offence, a bad mental or physical history may well be.[25] The reason for this appears to be that information on such matters may enable a sentencer to select a sentence as one which is more likely than another to curb or inhibit future criminal behaviour by the offender, or, where a custodial sentence is being contemplated, to consider a non-custodial one instead.[26] Low or below average intelligence was offered as a form of justification for the offence(s) in 12 of the cases in

[24] Adler, Z. (1987) p.127
[25] Shapland (1981)
[26] Nicholson (1992)

which the accused pled guilty and in six of the cases in which a guilty verdict was returned. Frequently it was said, in mitigation, that the offender' s low intelligence resulted in him having only a rudimentary moral judgement. In such cases, the offence was explained as merely a sign of his social inadequacy. Low intelligence impairing judgement was also used to apply to cases where the offender 'misread' social cues or 'mistakenly believed' that the complainer was sexually interested in him, as in the following case "Due to his lack of intelligence he mistook her friendliness for something more" (case 60 - guilty plea). (Somewhat atypically, in one case, the defence stated that the offender was "highly intelligent, articulate and pleasant" (case 57 - guilty plea). This was followed immediately by a request for probation which, incidentally, fell on deaf ears as the judge passed a sentence of 10 years.) There appears to be a thin dividing line between the portrayal of the offender as someone who is able to be an acceptable member of society and a complete inadequate. Too much emphasis on the latter may well have an adverse effect.

In seven cases, some form of "personality disorder" was cited as the root cause of the behaviour which constituted the offence. In none of these cases was there any definition given concerning this term, rather it was used as a catch-all phrase to denote generalised abnormal behaviour of which the offence was but an example. In two cases, the mental disorder was said to have a physical cause, "An old head injury caused his behaviour. That and his being abused as a child resulted in him suffering from a personality disorder" (case 86 - s.102); "He was a Siamese twin, joined at the head, and separated when he was a toddler. He still suffers headaches and nightmares as a result ... he is an epileptic .. he has a deep-rooted personality disorder" (case 83 - guilty plea). In such accounts, the offender's are depicted as suffering and troubled. In none of the cases where "low intelligence" or a "personality disorder" was cited, was there any professional verification from 'expert' sources such as psychiatrists or psychologists . In fact in the two cases in which a Psychiatric Report was available, mental illness was ruled out. There were three cases in which suicidal tendencies were mentioned, only one of these accounts were substantiated by Social Enquiry Reports made available to the court. This was a case where the offender was described in mitigation as "extremely immature, although he is 22 years old he behaves as one would expect an early adolescent to behave ... he shows suicidal tendencies ... He slashed his wrists a week before this hearing ... he has been assaulted three times whilst on remand" (case 80).

Physical illnesses or disabilities suffered by the offender were cited in several cases. In many instances it was not at all clear whether this was given as an explanation for the offence, or in an effort to avert a custodial sentence. Physical ailments ranging from stomach ulcers, deafness, back or head injuries, old war wounds, to epilepsy were offered

in mitigation. If the offender was also in receipt of invalidity benefit this argument was made more forcefully. In one vivid case, the offender had a vast repertoire of physical ailments, of which the defence gave an extremely detailed account. The 63 year old offender was described as having lost one leg in a mining accident, and suffered from a painful stump, an ill-fitting artificial limb, a trapped nerve in his left wrist, kidney stones, severe diarrhoea, prostate gland problems, food allergies, cataracts, a long-time viral infection for which he was on antibiotics, excema, and deep depression (case 84 - guilty plea).

Drink And Drugs

Alcoholism and, to a lesser extent, drug-taking, was stated in mitigation in 15 cases, generally conveying the idea that alcohol or drugs were contributory or causal factors leading to the offence. Drink is a commonly-used mitigating factor in other offences in Scotland,[27] so it was not surprising to find it used so frequently to lessen the culpability of the offender. In most cases, it was said that the offender had a long-term history of alcoholism. For example, "He has a drink problem and he drank the proceeds of the sale of the matrimonial home" (case 74 - guilty plea); "Over the years he has been a very heavy drinker, he accepts he has a drink problem. His daily consumption is 18 pints. He was drunk at the time [of the offence]" (case 63 - guilty plea); There were, however, a few cases where the offender was presented as being uncharacteristically drunk at the time of the commission of the offence, "He had never abused drink or drugs before" (case 62 - guilty plea) ; "He was drunk on the occasion [of the offence]. This was unusual for him. He cannot remember what happened. He came out of the toilet and entered the wrong room. He had forgotten to do his flies up. He fell onto the bed, not realising [complainer] was in it. A struggled fumble ensued, that's why he pled guilty" (case 66 - guilty plea). A history of alcoholism or being drunk at the time of the offence provides a context within which the offence is made more explicable. The implication is that the offender would not have committed the offence if he was sober. Alcohol or drugs had lessened or removed his normal inhibitions. The offence was not premeditated, as the offender was not in full possession of all of his faculties at the time.

Interestingly, there were a small number of cases involving a guilty verdict, where information concerning the *complainer's* alcohol and/or drug use both at the time of the offence and in general was given in mitigation. This was surprising as one may expect that such information regarding the complainer's state at the time of the offence would amount to aggravating circumstances, in that the offender may be seen to have taken advantage of her whilst she was drugged or drunk. However, this obviously was not the intention of the

[27] Nicholson (1992) 9-29 - 32, pp189 - 190

defence in giving such information. Rather, it appeared that, as well as showing bad character on the part of the complainer, such information was given as an indication that her drunken or drug-induced behaviour had provoked or precipitated the offence by creating a situation conducive to its commission. Admittedly this is a somewhat convoluted piece of logic, but there appears to be no other explanation.

Good Character and the Offender

By raising the issue of the character of the offender in mitigation, the defence is not only able to present the offender in a more favourable light, but this also provides another opportunity in which to put across the defendant's attitude towards the offence. Shapland (1981) found that there appears to be two totally different types of character which are mitigating - the *mature good worker* and the *immature drifter* with problems.[28] The latter character has been discussed at various points in both of the previous sections, appearing variously as the social inadequate, as someone who has never been able to hold down a job, as someone who has a bad social history. In the following section, I want to focus on the presentation of the former type of character, the 'good man'. But first I want to draw attention to that which was the most frequently used mitigating factor in guilty plea and s.102 cases, and which prefaced other mitigating factors. This mitigating factor is used as the first step in portraying the offender as a decent and honourable person who has other things going for him which should be taken into consideration by the sentencer. The defence commonly suggested that this information is important in relation to sentence, in particular as an indication of the offender's prospects for rehabilitation.

Sparing the Child -

In general in offences where a child or young person is the victim, 'sparing the child' from the ordeal of giving evidence is often cited as a major mitigating factor. Indeed that the victims were "spared the trauma of giving evidence in court" was the most endemic mitigating factor in all of the 41 'guilty plea' and 's.102' cases, and was cited most forcefully in those which involved a close relationship between the victim and the offender. In most cases the defence prefaced mitigation with some reference to the fact that the offender had "spared" the child, for example "He saved the complainer from the ordeal of a trial " (case 57 - guilty plea); "He has not subjected the complainers to the trauma of the trial" (case 67 - guilty plea); "He didn't put the victims through the trauma of the court" (case 75); "His actions have saved the complainer from giving evidence" (case 86 - guilty plea); "By pleading guilty he has ensured that the girls did not have to be brought in" (case 64 - guilty plea). This rather protective gesture functions to demonstrate not only an acceptance of blame, but also a willingness on the part of the offender to avoid

[28] Shapland (1981) p.64

subjecting the complainer to further distress. Whether used to convey genuine evidence of remorse, or represented as a self-sacrificial gesture on the part of the offender, a concern with the welfare of the complainer is a first step in displaying the offender in a more positive light, and as such is an important precursor to other mitigating factors. Yet despite this , concerted attempts to shift some of the blame on to the complainer at a later stage in mitigation are not uncommon.

It has been well-documented in child sex abuse literature that the trauma of the legal process has the potential to incur further damage to the child.[29] In particular a confrontation in court between parent (or carer) and child is seen as detrimental to the child's welfare. During the 1980's there was increasing public concern about the difficulties being experienced by children who were required to give evidence in open court, particularly when this involved speaking about distressing or embarrassing events, not only in front of the judge and lawyers and other court officials, but especially in the presence of the accused. Of course, a concern with the protection of young complainers is a general principle applying to all offences, and an increasing awareness of this has led to the development of special innovative procedures in court, such as the erection of screens in court, the use of recorded interviews and the use of live television links[30] for alleviating the stress to the child in contested trials. It is perhaps interesting to note that, in five cases, the defence in mitigation made specific reference to the fact that "research" (unspecified) had shown how potentially damaging the giving of evidence can be for the girl or young woman, and how the offender was keen to ensure that he did not cause her any further grief in this regard.

"A Good Family Man"

It is somewhat ironic that in mitigation in 'guilty plea' and 's.102 cases' the offender is represented as having perpetrated the offence, yet also, by pleading guilty and circumventing a trial, he is simultaneously accredited with having protected the complainer from the ordeal of giving evidence in a trial situation. But this rather odd dualism is noticeable with regard to other mitigating factors. Statements that the offender is otherwise a decent sort of hard working and caring man are common, particularly when the offence took place within the family. References to his employment record are also drawn upon in this regard. For example, one offender was described as having "always been employed ... always brought up his family conscientiously ... the allegations came as a shock, although he has always been worried and anxious about his behaviour" (case 67 - guilty plea). Another offender "always worked

[29] See, for example, Viinikka, S. 'Child Sexual Abuse and the Law' in Driver, E. & Droisen, A. (eds.) (1989) *Child Sexual Abuse : Feminist Perspectives*; Herman, J. (1981) *Father-Daughter Incest*;

[30] Murray, K. (1995) *Live Television Link* The Scottish Office Central Research Unit

hard to care for his family ... he struggled to give his children a decent upbringing" (case 55 - guilty plea), another "worked all of his life to provide for his family" (case 64 - guilty plea), another had "a background of respectability" (case 61 - guilty plea), yet another had "always set store by family life" (case 70 - guilty plea). The argument which underpins such statements is that the offender is a good parent in other respects, the sexual abuse which he inflicted on his daughters should be weighed up in the light of other factors which show him to be a good and caring parent. The use of parental care as a mitigating factor is well illustrated by one memorable case where "the matter came to light because of [the offender's] concern for his daughter's welfare" (case 56 - guilty plea). Here, the offender was concerned that his 15 year old daughter was being sexually abused by their lodger and, whilst in a state of drunken anger, rushed down to the local police station to report his suspicions. On being interviewed by a woman police officer as to the truth of her father's allegations, the girl revealed that it was not the lodger, but her father who had been abusing her since she was 11 years old. The representation of the offender as a good family is also used as a fundamental mitigating factor in other, non-sexual offences. In her study of a magistrates' court Eaton (1986) found that for the majority of defendants the pleas in mitigation were based on their family circumstances, and the defence would emphasise the part played by the defendant in the family life.[31]

Another characteristic of such cases are statements given in mitigation concerning the opportunity for sexual activity that is afforded by the close relationship between the offender and the complainer. For example, "It was only one incident when he had the opportunity for many more" (case 55 - guilty plea); "[Sexual activity] took place on 3 or 4 occasions at most, although there were other opportunities" (case 67 - guilty plea); "Intercourse was not on a regular basis" (case 92 - s.102). This was presented in terms of the offender having the strength of character to resist further temptation, even though he was in very close and continuing contact with his daughter. The use of this mitigating factor was not just restricted to cases involving a parent or close relative of the girl, but could be found in cases where the offender was a neighbour or family friend or someone with whom she was in regular and/or close contact. For example, in a case where the offender was a family friend, "Apart from the one incident, he always desisted when [complainer] asked him to play with her" (case 93 - s.102). In other words, the offender did not do all that he might have done in the circumstances.

The possibility that a prison sentence would lead to a family break up was also used in mitigation. In 18 cases, it was stated that the offender's family relationships were at risk if he received a custodial sentence. In 10 of those cases it was explicitly stated that the

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[31] Eaton, M. (1986) *Justice For Women ?: Family Court and Social Control* p. 45-46

consequences for the offender's wife and/or children would be particularly bad. In three cases it was stated that the offender wished to marry and that prison would prevent the marriage occurring. As noted earlier, it is common in mitigation to introduce what the consequences of a severe sentence would be on an offender's dependants. The focus is usually on the emotional and/or economic harm that may befall members of the family should the offender end up in prison on a long sentence. This was particularly so in three cases where the offender's partner was pregnant. What was particularly interesting, however, was the emphasis given in mitigation to the fact that the offender's wife or girlfriend had stated that she would "stand by" or "take back" the offender. Representing the offender and his partner in this state of togetherness, indicates that they have already begun to work at solving problems (particularly in those cases where the offence was attributed to a breakdown in their relationship), that the offender is trying to become an approved member of society, and that the future of their relationship is in jeopardy should a custodial sentence ensue.

No Danger To The Public

Related to the notion of resistance from the constant temptation that is embodied by the complainer, is the representation of the offender as someone who does not pose any danger or threat to the wider community. In case 61 which involved a father and daughter, it was stated that because the sexual acts involved only his own daughter and no other young girls, "He constitutes no danger to the public." Similarly, "The acts were not of a predatory nature - they were confined within the family" (case 87). The offender is thus presented as someone who poses no threat to any young girl who is not a member of his immediate family. Presumably this is used as a mitigating factor because one of the objectives of sentencing is to seek to secure that the public will be protected from the criminal activity of a particular offender, [32] which may suggest the need for a custodial sentence. If the 'wider public' is not under threat, then the implication is that a non-custodial sentence may be an appropriate disposal. This, of course, does not deal with the protection of the victim within her family, but rarely is this issue dealt with at the sentencing stage.

This depiction of the offender who is not a source of danger to the public was also used in non-incest cases. In these cases, there was a denial of his indiscriminate sexual activity with young girls, but rather the girls with whom the sex took place were presented as provocative and actually encouraging, and therefore it was 'that girl' rather than any other who was the focus of the offender's intentions. The important point for mitigation is that the offence is not a random act, but focused in a specific way. The complainer is either a

[32] Nicholson(1992) 9-05 p.179

specific type of girl - provocative and encouraging - or, in incest cases, a proximate source of comfort. These explanations are used to facilitate the argument that the offender is not a danger to the public in a way that a reliance on an explanation of indiscriminate sexuality could not manage.

Useful Employment

Although references to the offender's employment record are commonly made in the context of the offender being a 'good family man', they are not restricted to the category of married offender who sexually abuses his children. Employment record and, equally, future employment prospects are common mitigating factors featuring in relation to several different types of offence. There were several cases in which employment or lack of it was specifically mentioned in mitigation. For the most part, employment was brought out to show that the man was hard working, reliable and making a useful contribution to society and/or the damage that a custodial sentence would cause to his employment or financial prospects, for example "He has been employed in the Ministry of Defence for over 20 years, if he is sent to prison he will lose his pension rights". This constitutes a form of 'double jeopardy' in terms of excess punishment.

Past Good Deeds

In a small number of cases, efforts were made in mitigation to show that the offender had a high degree of moral worth by citing good deeds that he had carried out in the past. Sometimes these good deeds were quite spectacular, for example, in case 67 it was said that the offender, who had been a Royal Navy engineer for a number of years had been instrumental in saving a fellow seaman's life. In case 77, it was said that the offender had served with the Royal Scots regiment and had received a bravery medal. In three other cases, the fact that the offender had 'served his community' in some capacity was also given in mitigation. This meritorious conduct obviously has nothing to do with the offence, but it does give the offender more moral credit, as it were. It is unclear, however whether it has any effect on the sentencer's decision.

Regret and Remorse

The offender's attitude towards the offence is very important, and a statement by the defence that the offender deeply regretted the offence was certainly very common in the observed cases. Apologising for the offence, admitting that he has done wrong, and trying to make amends in some way are treated as mitigating factors. It has to be said that an expression of remorse or contrition by the offender was somewhat easier to believe in those cases where the offender had pled guilty rather than in those cases where he had pled not

guilty. Nevertheless there were a small number of cases where, even though the offender had pled not guilty and fought the case, it was stated in mitigation that he was apologetic and remorseful !

In virtually all of the incest-related offences or those where there was a close relationship between the offender and victim and where there was a plea of guilty, there was some statement to the effect that the offender admitted doing wrong, accepted (some) responsibility for his actions, realised that he faced a severe sentence, and was deeply regretful, for example "He is extremely ashamed of his behaviour, and has asked me to convey his profuse apologies to the girls and the family" (case 58 - guilty plea); "He asks to say he is sorry ... he accepts the seriousness of the charge' (case 63 - guilty plea). The majority of non-incest guilty pleas also contained similar statements. There were however a small number of cases where it was stated that the offender had not appreciated the seriousness of the offence(s) although this was usually given in conjunction with a depiction of the offender as a social inadequate.

The act of pleading guilty, whether as libelled, or to a lesser charge, was described as a brave and courageous act on the part of the offender. (This may have more to do with the proving of cases and the probability of conviction in contested trials than bravery, but was nevertheless given in over half of the guilty plea cases.) The defence would beseech the sentencer to acknowledge that it "requires courage to plead guilty to such a charge" or to "take into account this man's bravery in admitting the charge." It appears to be the opinion of defence lawyers that to display the offender as "remorseful", as "guilt ridden" as "profusely apologetic" and to state that the offender "acknowledges his problem and is sorry" can be extremely favourable for mitigation.

Statements of remorse were usually a preliminary matter in mitigation, and typically preceded statements about how the offender had tried to harm himself; had tried to compensate for his actions to the complainer and/ or her family; how he requires help and would be willing to undergo any sort of treatment. In eight cases, a suicide attempt by the offender was interpreted as an indication of the level of his remorse. An extreme example was the offender who was "deeply ashamed and remorseful" and "willing to undergo medical treatment, drug therapy, sterilisation, and even castration" in an effort to show his contrition (case 75 - guilty plea).

As in Shapland's study, the factors given in mitigation in the observed cases in the main demonstrated the sequence and structure of apologies as defined by Goffman (1972).[33] Factors which indicate that the offender realises he did wrong ("accepts his guilt"; "admitted his guilt from the start"; "and must face punishment ("realises he faces prison as a result of his actions"; "is facing up to his responsibility") prefaced expressions of embarrassment and shame ("is deeply ashamed"; "expresses deep regret") and were followed by expressions of action taken by the offender after the offence ("he has attempted suicide"; "he has taken an overdose of tranquillisers"; "he has voluntarily attended a clinic"; "he has assisted the police in the recovery of the stolen articles") .

Requests For A Specific Penalty

A discussion of the penalty already paid by the offender frequently appeared penultimately in mitigation, before a request for a particular sentence. The 'penalty already paid' is usually along the lines that he has already paid quite a price in terms of punishment. "The court cannot punish this man as much as he has punished himself. He has alienated himself from his family because of his shame at implicating them in all of this" (case 87 - guilty plea). Ostracised by his family, undergoing a divorce, a social pariah in his community, forced to resign from his job, the offender is depicted as having already suffered enough, without the prospect of a lengthy prison term. At this stage in mitigation, the sentencer was implored to exercise his or her discretion and "give this man some hope for the future."

As previously mentioned, any previous convictions are initially brought up by the prosecution. If the offender has no previous convictions, then the offence is presented by the defence as a "one-off" offence and the lack of record is presented as boding well for the future. If there are convictions, but of a non-analogous nature, the "one-off" argument will be similarly used - that the sexual offence is totally out of character. However, even the presence of a number of previous convictions can be turned around as a mitigating factor. In one case, the fact that the offender had a string of previous convictions for similar behaviour was used to suggest that the complainers in the case were aware of this and viewed the offender as an "easy touch". Where there are similar convictions, arguments to show the offender as an otherwise reliable, stable or decent person are not uncommon. Hence the depictions of the offender as hardworking, involved in community good works and conscientious and diligent in his efforts to bring up his family.

Typically the defence will close mitigation with a request for a non-custodial sentence. Prison is an unpleasant place, much more so for the sex offender whose victim is young. Frequently in mitigation it was said of those offenders who had spent some time in custody

[33] Goffman, E. (1972) *Relations in Public* pp143 - 145

awaiting a trial or a hearing that they had already been assaulted or had received threats from other prisoners outlining the treatment that awaits them, "He has been assaulted three times since he has been in custody" (case 80 - guilty plea); "He has received a number of death threats from other prisoners" (case 57 - guilty plea) : "He is in fear of his life from other prisoners" (case 93 - s.102).

Request for non-custodial sentences were also made on the grounds that a prison is an unsuitable place for the offender, because it cannot offer suitable treatment for the offender, or because it is an inappropriate disposal given the offender's particular needs. There were five cases where the offender's disabilities (physical and psychological) were cited as specific reasons why he should not be awarded a prison sentence. For example "A prison has no provision for this man. He requires to be able to draw for his therapy." (case 65). Shapland (1981) found that there was a tying of personalised accounts to specific types of sentence. This was attributed to a growth in the number of different types of sentence available and the principle of individualisation of sentence - that the sentence should 'fit' the offender. [34] This fitting of the offender to the sentence appears to remain the case, and such efforts characterised the observed pleas in mitigation. Not only were lengthy details concerning the offender's personal circumstances given, that is, whether the offender is employed, is in a stable relationship, has children, has a 'solvable' problem - but a sentence 'recommendation' was put forward by the defence, matching the offender's circumstances to an 'appropriate' sentence. In the main, where the defence was able to cite a range of socially approved characteristics of the offender in mitigation - remorse, employment, attempt to make amends, stable relationships, indication of moral worth - and in particular, an indication that the complainer was partly responsible - then the recommendation for leniency including, sometimes, a specific request for some form of community sanction was more frequently made.

It was common at this end stage for there also to be a brief summing up of all mitigating factors which had been given. Although these factors had already been cited as reasons for the offence or to reduce the seriousness of what occurred, these were re-presented at this stage as specific considerations why a more lenient sentence should apply.

The Use Of Stories In Mitigation

Mitigation speeches sometimes consisted of a collection of (sometimes unrelated and even contradictory) mitigating factors or arguments assembled by the defence but much more commonly, consisted of whole narrative accounts or stories about the offender and his

[34] Shapland (1981) p 66 - 67

circumstances in which were woven some or all of the factors cited above. In those cases in which stories were given a fairly detailed verbal picture of the offence from the offender's point of view emerged. This was perhaps to be expected in those cases in which the offender had pled guilty. Because no trial had taken place, the offender had not had the opportunity to put his side of the case and hence the plea in mitigation provided (possibly the only) opportunity for him to do so. Shapland (1981) suggests that the use of the narrative account or story is a more effective mitigation method than simply trying to dispute (often necessarily disjointedly) some of the elements or circumstances of the offence as relayed by the brief prosecution account of the 'facts' of the case. This is because the story method allows the offender to rely on the competence of the sentencer as a member of everyday society to "realise that the scene could have been perceived by the offender as he describes it in his story."[35]

Shapland goes on to argue that this method is not open in the same way to an offender who had pled not guilty but was subsequently found guilty. The reasons for this, she suggests, is that an offender in a contested trial has already had his say, as it were, and any change in his story at that stage will be no more than an indication of inconsistency.[36] However, similarly lengthy story-like accounts also appeared to be the norm in those cases in which a guilty verdict had been returned and in which evidence had already been led. Although some pleas were little more than re-iterations of what had been already stated during the trial - particularly concerning the culpability of the complainer - with some added personal details concerning the offender's domestic or past circumstances, in other pleas the information given in mitigation was often introduced for the first time. Some of this was grossly inconsistent to that which had been argued in the trial. For example, in case 18, it was stated in mitigation that the offender's daughters who he had been sexually abusing over a very long period retained a high degree of affection and loyalty towards their father and did not want him to go to prison, whereas it had been argued by the defence in the trial that the daughters had conspired against their father by falsely alleging the sexual abuse in order to get him out of the house. Similarly, in case 8 it was alleged in mitigation that the offender's wife desperately wanted him kept out of prison and that his relationship was in jeopardy should he receive a custodial sentence, when it was argued in the trial that he had turned to sex with the young complainers (aged 5 years and 11 years) when relations with his wife had irretrievably broken down and she had moved out of the marital home.

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[35] Shapland, J. (1981) p. 73-74
[36] Shapland, J. (1981) p. 74

All of the mitigating factors cited in the previous sections were used to convey that although the offender did in fact commit an offence, he was not altogether reprehensible. His behaviour is explicable in terms which minimise his responsibility and/or negate the seriousness of the offence. Very often, the same factors were brought into play to fulfil both of these functions. By locating the offender and the offence in a context, and using that context in explanation and rationalisation, the defence is able to offer some justification for a more lenient sentence. Characterisations of the offender as morally, psychologically , educationally or socially deficient were common, but so were typifications of the culpable complainer. Both of these strategies enable blame to be respectively diffused or displaced.

As previously mentioned, many of the arguments used in mitigation appear to directly contradict each other. A strong impression is given of the defence treading a fine line between a number of issues - if one mitigating factor is pushed too far, then this may inadvertently damage the case for other mitigating factors. If, for example, too much is made of the fact that the offender is a product of a 'problem' background and hence prone to 'problem' behaviour, does that not indirectly refute the fact that he is 'no danger to the public' ? How can someone who has pled guilty to incestuous sexual intercourse with his children taking place over a protracted period of time be simultaneously described as a 'good family man' ?

Many factors proffered in mitigation are clearly multi-purpose. Whilst it is often explicitly stated by the defence that a particular factor, for example, the lack of injuries sustained by the complainer, reduces the seriousness of the offence, it is often the case that some factors are used to different ends. For example, information concerning the offender's family circumstances may be used to show that he is a 'good family man' but may also be used as a means of pointing out the distress and difficulty that his family would face if a severe prison sentence was imposed. This of course does contribute to the perception, mentioned earlier, that pleas in mitigation have a somewhat 'rag bag' quality. But equally, such pleas could be seen as being extremely densely-textured, multi-layered and more complex than they at first appear.

Ironically, the defence in mitigation is attempting to represent a study of human conduct by citing a wide range of factors as relevant to an understanding of the offender and the offence. Yet this is typically done in an extremely narrow way without, for example, any recognition of current rhetoric or research findings regarding the behaviour of sexually abused children. Of course, the defence in mitigation is under no obligation to do so. But

rather there is a strong reliance on a range of presumptive statements and a set of easily falsifiable assumptions and stereotypical notions about the behaviour of young victims of sexual offences.

The question of the reliability of the content of pleas in mitigation has already been raised earlier in this chapter. The use of social enquiry reports which may provide some form of verification of the offender's personal circumstances was relatively rare. Such reports were drawn on in only a small number of cases, approximately 10% of the sample. Whilst it is unclear whether it is actually the case (and beyond the scope of this research to establish whether it is in fact so), it does not seem unfeasible that some of the defence lawyers may well have been somewhat selective, if not creative, in the presentation of mitigation information. The key fact, however, and as pointed out by Ashworth (1983) is that the defence in mitigation is merely doing his or her duty. In a mitigation speech the defence must, unless he or she knows for sure that the information provided by the defendant is definitely false, put forward as persuasively as possible the explanation proffered by the defendant in an attempt to influence the sentencing decision in a way that is favourable for the offender.

Mitigation : The Views of Practitioners

The issue of the role of the defence in mitigation was discussed with the interviewees. All interviewees stressed that, in a plea in mitigation, all possible mitigating factors must be brought out by the defence. All considered it the duty of the defence to do so. However, they also suggested an additional - more pragmatic reason - why all possible mitigating factors should be stated, and that is because it is not known in advance which factors the sentencer will accept as being important or relevant in determining sentence. Hence, all possible information is given, and this may go some way to account for the somewhat 'rag bag' quality of pleas in mitigation alluded to earlier.

There was a consensus amongst the defence lawyers interviewed that it was in their client's best interests for them to bring up anything and everything in mitigation which could be considered to influence the sentencing decision. However, as one explained, whilst defence lawyers do take instructions from their client concerning his point of view of the offence, and they do try to represent that point of view as accurately as possible, they often have to "prune" some of what is said by their client, particularly in relation to the offence. This does infer that the defence are sometimes selective in what they present in mitigation. One reason for this is, as another defence lawyer said "sometimes [accuseds] go over the top" and consequently their accounts "lack realism". Realism is, as Shapland (1981) found, an

important component of mitigation.[37] Defence lawyers that she interviewed maintained that being realistic was essential in mitigation, and that it applied both to the types of mitigating factors that are used, particularly in how they relate to any aggravating factors, and to sentencing suggestions.

There is also another reason for 'pruning' the accused's account and that is because the defence lawyer has a much better idea of what may be favourable for mitigation and acceptable to a sentencer, and what may not. Shapland (1981) found substantial differences when she compared the content of pleas in mitigation given by defence lawyers with those given by unrepresented offenders.[38]

Defence lawyers interviewed for this research maintained that they would exercise their discretion in those cases where the offender puts forward a blatantly unrealistic account of the offence. There appear to be two reasons for this. The first concerns the duty of the defence towards their client. On the one hand, the defence should put forward all points favourable for mitigation and, as a legal practitioner, has a better idea of what may 'work' in mitigation. As a defence lawyer, he or she is much better placed to give advice to an offender as to what may or may not be acceptable, and what may ultimately be considered by the sentencer to be an aggravating, rather than a mitigating factor. Obviously this would depend on the facts of the case, but one defence lawyer cited drink as "one of those [factors] which could go either way". Experienced defence lawyers, he explained, would be able to judge when some factor should be presented as mitigating. On the other hand, the defence lawyer also has a duty as an officer of the court and, although somewhat complicated in practice, the defence lawyer should not deliberately mislead the court by giving false information in mitigation when they know it to be not true. One defence lawyer stated also that he would feel justified in 'pruning' an offender's 'unrealistic' account if he felt that his own credibility as a professional legal practitioner would be put in jeopardy by stating everything that the offender had said.

All interviewees considered that factors concerned with the actual nature of the offence, the gravity of the offence, the offender's attitude (in particular signs of remorse and contrition) and his personal circumstances, both past and present were always relevant for mitigation. As previously stated, these sort of factors, which offer a context and a rationale for the offence, are generic to pleas in mitigation, appearing in many different types of offences.

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[37] Shapland, J. (1981) p. 82- 83
[38] Shapland, J. (1981) p. 145-146

The Issue Of Consent And Mitigation

It was put to the interviewees that a considerable amount of information concerning the complainer was given in the observed pleas in mitigation, and that such pleas, in many ways, provided a clear 'snap-shot' picture of common lines of defence questioning and argument in contested sexual offence trials. All but one of the interviewees, a judge, were not surprised about this research finding. Information concerning the complainer, in particular that relating to her possible provocativeness was considered to be entirely legitimate for mitigation. Similarly, only two interviewees, a sheriff and a judge, felt that the presentation of the complainer as *consenting* was unusual in mitigation. There was little surprise at the research finding concerning the strong emphasis given to the issue of consent in mitigation. Such information is considered as providing a *fuller picture* of the circumstances of the offence and the offender's reasons for committing the offence, and therefore was centrally important for the proper consideration of sentence. As one sheriff said :

> "To have a narration that a man of fifty was having sexual intercourse with a thirteen year old girl, it is perhaps thought that, stated baldly, it would reflect very much worse on the accused, than if perhaps the circumstances of perhaps incitement on her part, or consent, show the whole circumstances."[39]

Interviewees were of the opinion that the issue of consent was a proper matter for mitigation. Such information may be important for mitigating both seriousness of the offence and the culpability of the offender. As one defence lawyer maintained:

> "the criminality element or the severity of the offence might be very much reduced where the girl is close to the age of consent"

This view was further borne out by informal conversations held with defence lawyers in the court room following some of the observed pleas. Information about the complainer's lifestyle, her previous sexual experience, her sexual reputation, and the question of consent were all considered to be relevant factors for mitigation and all defence lawyers that I spoke to informally were convinced that this sort of information would be considered relevant by the sentencer, even though, in the 'guilty plea' and 's.102' cases this was put forward in the absence of any 'proof' other than being something told to them by their clients.

What became increasingly clear from the formal interviews and the informal conversations was, first, that the issue of consent was perceived to be a proper issue for mitigation.

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[39] It should be noted that this, and some of the other excerpts from the research interviews that follow in this section appear in Brown et al (1993) chapter 8, p. 120-122. Whilst mitigation, as such, is not discussed in the book, some of the interview material is drawn on in relation to the issue of consent.

Despite consent (or, more accurately the lack of consent) not being part of the definition of the offences under consideration in mitigation, and despite the fact that the consent of a young women under the age of 16 years is technically irrelevant, consent was nevertheless considered by legal practitioners to be an important consideration for sentencing in such offences. Second, it became clear that contested trials and pleas in mitigation do share a number of characteristics. This in turn implied that they share a common aim. It has been suggested throughout this chapter that pleas in mitigation of sexual offences involving young female complainers resemble some aspects of contested trials, particularly in relation to the issue of consent. But discussion with interviewees revealed that, in fact, some aspects of contested trials are themselves forms of mitigation. It is in this regard that discussions with the interviewees cast more light on the puzzling phenomenon of the predominance of consent-based rape-model type of arguments in contested trials involving young complainers.

It was stated at the end of the last chapter that there were a *second* set of reasons for the seemingly paradoxical dominance of consent-based arguments in the contested trials, apart from the chance that such arguments may affect the adjudication decision made by the jury. To return to this, the second set of reasons concerns the relationship between the *suggestion of consent* and the *mitigation of the offence*. It is often the case in a criminal trial that factors which mitigate the offence may have already emerged in the course of the trial in advance of the verdict being returned.[40] This may be due to any one of a number of reasons, for example, factors relevant for mitigation may have emerged in the narration of events by the prosecution or defence witnesses, in the cross-examination of the complainer, or in the substance of reports made to the court. It will also be recalled that, in Scots law, it is entirely competent to lead evidence concerning mitigating factors during the course of the trial. In the cases observed for this research, it appeared that evidence on the issue of consent was being pursued and seeded during the trial specifically for the purposes of mitigation.

Interviewees largely concurred in their recognition that the issue of consent in trials involving young complainers, whilst not technically relevant in terms of the age of the complainer or the nature of the offence, may indeed be raised throughout the trial as a kind of 'early plea in mitigation' seeking to lessen the sentence should the accused be found guilty. This is because as one judge put it:

> "One normally expects the trial to bring out everything to do with mitigation - even if much of it is not relevant to guilt.

[40] Nicholson (1992) 7-12, p118

The judge was implying that the question of consent, whilst of little relevance to the question of guilt because of the age of the complainer may be of central relevance to the consideration of sentence. A second implication of this pronouncement is that the judge considers the trial to be an arena in which *all* possible information concerning the events, the relationship between the complainer and the accused, the relative seriousness of the offence and the culpability of the offender should be aired. He justified this, firstly, in terms of the 'right' of members of the jury to the full picture, and secondly, in terms of the right of the sentencer to hear all information concerning the case.

One of the defence lawyers raised a second reason why mitigating factors were introduced in the trial setting. He pointed out that, often, the thinking behind the introduction of mitigating factors was essentially tactical, particularly in cases where :

> "the trial were going against you ... then ... from a mitigation point of view it would be relevant to at least investigate whether or not it was of consent.

There was yet another important issue concerning the relationship of consent-based arguments and mitigation that was raised by another defence lawyer. This concerned the practice which he termed as "going to trial on mitigation". That is, the process whereby

> "one brings out facts during the course of the case that cannot be properly pled before a court if you just plead guilty, but can be elicited from a witness during the course of them giving evidence. And it might be the case that defence agents do this because they are going to trial on mitigation, on the basis that if they can get that out during the course of cross-examination, whilst they know very well that it's not a defence, they are also aware that if [the sentencer] believes for instance that there was consent involved here, that he may, when he's coming to sentencing, view it more leniently than he did or would do if that wasn't brought out."

This kind of tactic may be employed when it is felt that there are facts pertaining to the case which may affect sentence and which it may not be possible to air fully in the opportunity availed by a plea in mitigation following a guilty plea by the accused. In fuller explanation, the defence lawyer went on to say that:

> "it's very difficult when you're submitting to a sheriff in mitigation, having pled guilty, it's very difficult indeed to impress upon a sheriff the fact that the complainer consented, in the same way that one would be able to do , if you actually had the complainer in the witness box and put that to them. It's much more convincing if you can get that from the complainer in the witness box."

This view was confirmed, this time by a prosecutor who explained that :

> "The purpose of a criminal trial is not always to establish guilt or innocence. Sometimes a trial is effectively a plea in mitigation."

This of course means that young complainers are exposed to the same testing ordeal as that encountered by adult complainers in rape trials and as such, 'early mitigation' must be viewed as an abhorrent, albeit potentially effective, method of advocacy. The distastefulness of the practice was recognised by one prosecutor, who stated

> "Now, it may be that the defence are hoping for a sympathy verdict , or hoping to just hammer home the fact that this was something done consensually, albeit that technically that's not a defence. Clearly ... that is a gross abuse of a witness's presence in court ...it's just a sad legal fact"

In addition, conducting a full trial in the knowledge that a guilty verdict will inevitably result, even though it may be justified by defence lawyers in terms of being in the best interests of their clients, can also be said to be in blatant disregard of current directives concerning the need to reduce the pressure of court business.

The seemingly paradoxical appearance of the issue of consent in contested trials thus does appear to be, partly, a form of 'early mitigation'. That what is in fact happening is that throughout the trial, the issue of consent is raised strategically *in advance* and applied pragmatically by the defence to mitigate seriousness of the offence and/or culpability of the offender should a verdict of guilty be returned. Certainly the parallels between mitigating arguments following a guilty verdict or a 'guilty plea' and the way that evidence is used to suggest consent in contested trials are very strong. Defence lawyers, during the course of their performance in the trial and at the mitigating stage appear to deploy the same arguments to influence both adjudication and sentencing decisions. This of course raises the question of whether such early mitigation arguments are recognised as such by the prosecution and the judiciary during the trial and, further, whether such arguments, although not relevant to guilt, are considered to be relevant to the sentencing decision.

Interviews with legal practitioners suggest that some defence arguments in the trial are in fact recognised as 'early mitigation'. As one prosecutor said :

> "It may be that I have agreed in advance with the defence that this sort of information will be introduced and, whilst not relevant to guilt, may well be an issue in the case, and therefore useful for mitigation"

This point of view was backed up in an informal conversation with a prosecutor following a trial which was dominated by consent-based arguments, the prosecutor (who was not involved in the trial in any way) ventured the possibility that this may be a reason why prosecutors do not object to the use of such evidence in the trial.

Of course, the deploying of possible mitigating factors throughout the trial raises a further question concerning the use which is made of such information in the sentencing decision that is reached by the sentencer. This is not all that clear. The investigation of this particular question is , however, way beyond the scope of the present study, and would require much more extensive research.

CHAPTER NINE

CONCLUSIONS AND IMPLICATIONS

In this final chapter, the various strands of the thesis are drawn together and the initial research questions set out in the Introduction are also returned to. Up until now, the thesis has described, in parts in great detail, the procedures and processes taking place in the court room. This chapter reflects on these processes and looks at some of the implications of what takes place, both at the level of criminal justice and also at the level of what can be called here social justice.

Images of Sexuality

Throughout this thesis, the issue of young female sexuality is examined through the lens of the sexual offence case. It will be recalled that one set of research questions outlined in the Introduction concerned the construction and use of images of young female sexuality in the court room. At one level I have tried to document the ways in which images are invoked and the focus on sexuality takes place. Court observation of contested trials and guilty plea cases reveals that (several) images of young female sexuality pervade the court room in the criminal justice processing of such cases, and I examine the way in which information about the complainer is used in the construction of these images. Images are conveyed through the use of evidence in contested trials and drawn upon in mitigation speeches. Whether explicitly articulated or implicitly invoked, images resonate throughout the processing of sexual offence cases.

In addressing the question of the images, I have also tried to demonstrate how they are grounded in a construction of difference between (stereo)*types* of girls. These are, on the one hand, innocent, chaste and asexual 'good' girls, and on the other seductive, promiscuous and sexual 'bad' girls. These form the basic stereotypes which inform much of the legal rhetoric deployed within the court room. Gender stereotypes and their symbolic use appear prevalent in the arena of the court room, underpinning and infusing the trial process. Within these stereotypes are embedded a mesh of ambivalences and contradictions about the sexuality of young women and girls, which, in turn, are perpetuated within and by the court process. These ambivalences in relation to the sexuality of girls, where they are perceived as either sexually vulnerable or sexually threatening, appear well established within the context of legal (and social) discourse. This may be traced back (at least) to the last century where ideas about youthful sexuality were incorporated within the framework of legislation which formulated new and distinct categories of sexual offences and

simultaneously raised the female age of consent. In many ways, the legislative formulations appear to be premised upon this dualistic notion of competing and opposed sexualities.

The prevailing nineteenth century legal, moral, social and welfarist discourses concerning the sexuality of girls were reflected and reinforced in the extensive public and parliamentary debates which preceded the 1885 Act. The Act appears to be founded on welfarist principles, having as an aim the protection of young girls from sexual involvement with older men. It was for this reason that the resultant legislation extended the legal prohibition on sex with girls under puberty to girls up to the age of 16 years. By supplementing the older common law prohibition (based on the doctrine of non-competency) with a statutory prohibition based, ostensibly, on protectionist principles, the legislation effectively rendered the consent of older girls irrelevant, and by so doing effectively implemented a degree of social and legal control over the sexual autonomy of young women. Yet despite its preoccupations with protecting girls, this piece of legislation, the cornerstone of today's statutory sexual offence legislation, made a clear policy distinction between saveable and non-saveable girls. Young girls were perceived largely in terms of whether they are saveable/deserving 'good' girls or non-saveable/undeserving 'bad' girls, defined in relation to their sexuality and sexual behaviour. The protectionist element of the legislation was clearly aimed at those girls seen to deserve the law's protection, excluding from the law's protection those considered undeserving. By so doing, the 1885 legislation had the effect of sustaining the categories of deserving and problem girls in the eyes of the law using sexuality as the basis of differentiation.

The study tries to reveal how this social construction of difference between types of girls which emerged initially out of welfarist/protectionist concerns in the last century gets re-shaped by law and articulated in legal mode in the contemporary court room. It is argued that in the processing of sexual offence cases, legal rhetoric constantly reproduces this dualistic (and somewhat crude) frame of reference of 'good' and 'bad' girls. One effective way of conveying this difference in a court room is through the use of stereotypical images of female sexuality which are used to characterise the complainer as an undeserving 'bad' girl and hence differentiate her from the ideal 'good' girl, the innocent and deserving victim. Quite simply, the complainer is located by the defence in terms of her sexuality. Throughout the trial, she is referred to and depicted by means of (sometimes a series of) 'bad' girl images, with the ultimate aim of discrediting her as a credible and reliable witness.

In order to gain a fuller understanding of the appearance and use of these images of female sexuality which are deployed in the court room, and the ways in which they are conveyed, their rather complex relationship to legal-evidential issues that pertain in a criminal trial are

examined. As a first step, the legal concept of 'character' is identified as a fulcrum of the sexual offence trial. Sexuality is a major component used in the construction of sexual character and the thesis plots the way in which the young complainer's sexual character is invoked and built up by a variety of explicit and rhetorical methods over the course of a trial. It also plots how sexual character is inferred in the process of mitigation in guilty pleas. On the one hand, the ascription of sexual character operates as a means of identifying and categorising the complainer as a type of girl. Yet, on the other hand, sexual character is also the main conduit through which images of sexuality are pinned down, channelled and applied to other evidential issues such as the reliability and credibility of the complainer.

Sexual Evidence and the 'Shield' Legislation

A second set of research questions which the study addresses cluster around the Scottish 'shield' legislation and, specifically, whether evidence which constitutes undue questioning about complainers' sexual lives is in fact being used in sexual offence trials involving young female complainers and, if so, what form the sexual evidence takes in such trials. On the basis of the cases observed, there appears little doubt that sexual evidence is being used. Indeed, such evidence is utilised in trials involving young female complainers in ways not too dissimilar from older women, although there are some marked differences that, specifically, cohere around the concept of sexual character, which will be reiterated below. It will be recalled that sexual character was one of the main problematic concerns of the Scottish Law Commission in the 1980's when they were devising the Scottish 'shield' legislation. Their extensive deliberations on the question of sexual character informed the drafting and design of the legislation, which contains a general 'sexual character' exclusion.

Court observation of cases reveals that the defence often display an intense preoccupation with the sexual character of the young complainer, This is not too different from the focus on the sexual character of adult complainers documented by Brown et al (1993) and Adler (1987). However, the main difference is that, in the case of a young complainer, the defence will focus on *any* evidence which shows her to be a 'sexual being', rather than as is the case with older women, where the defence focus is on any evidence which specifically suggests 'bad' sexual character. In the quest to establish the complainer as a sexual being, the emphasis is on portraying her as sexually aware, sexually interested, in other words it is a quest which aims at demonstrating her sexuality. In a young girl, evidence of her sexuality is sought on both a physical and a cognitive basis. For example, a physically developed body and the onset of menstruation are taken to indicate burgeoning sexuality. Equally, a premature awareness of sexual matters, such as knowledge of sexual terms, is used to demonstrate sexuality; as is the fact that she likes to dress up, wear make-up, or has an interest in boys. All of these factors are treated as indicators of sexuality, and are

used to show the complainer to be a 'sexual being'. Sexuality in turn is equated with sexual character. Characterising the complainer as a 'sexual being' is a powerful invocation, as it calls into play the images of threat and danger which so disturbed nineteenth century sentiment concerning female sexuality and appropriate sexual behaviour and which, it is argued, continues to inform much of contemporary legal rhetoric.

Excluding sexual character evidence is difficult to achieve because of the ease with which such evidence can be introduced by means of connotation and inference during the course of the trial. Brown et al (1993) show how the suggestion that the (adult) complainer is promiscuous and therefore also a liar can be made quite easily through the deployment of evidence that is not even sexual in itself, but can be elicited through questions such as "You are often out late?"; "You drink regularly ?"; "You are an unmarried mother?" and used in the construction of a 'bad' sexual character.[1] In cases involving young complainers, a similar process can be observed to take place. However, the manner in which this is done is again slightly different from that documented by Brown et al. In the case of younger complainers, information concerning contraception and of course, virginity, can have a similar effect to questions about drinking habits and unmarried motherhood asked of adult complainers. Sexual character can be conjured through references to the complainer's general lifestyle, her choice of friends, or her preferred leisure activities. Similarly, questions concerning dates of past pregnancy and/or abortions which may not be directly sexual in themselves, but the inferences that can be drawn - particularly if the complainer is young - can be potentially damaging in terms of her character.

Another key objective of the Scottish legislators was to sever the implied link between sexual immorality and credibility. That is, they wished to exclude the use of evidence which aims to show that because someone is sexually promiscuous or of easy virtue then they are also a liar. In the cases observed here, the tying together of immorality and lack of veracity can be seen to occur, although this is done largely through seizing on aspects of the young complainer's sexuality in order to show her lack of credibility. The way that this is done again owes much to prevailing cultural stereotypes, which depict young girls as typically untruthful and unreliable in relation to most things, but particularly with regard to sexual matters. This stereotypical image of the young girl who does not tell the truth is drawn on in the court room, wherein young girls are portrayed by the defence as prone to sexual fantasising, and apt to make things up out of guile or artfulness or pure maliciousness.

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[1] Brown, B. et al (1993) *Sex Crimes on Trial* p. 205

The Scottish Law Commission also aimed to exclude evidence introduced on the basis of a sexual character construction of a predisposition to consent. In other words, they wished to exclude evidence introduced on the basis that because a women has consented with man A and man B in the past, she can be presumed to have consented with man C. The study shows that in trials involving young complainers, the construction of sexual character is in fact an important precursor to introducing the issue of consent which, even though technically not an issue, is nevertheless a characteristic of such trials . Yet the way that the issue of consent is invoked and used in trials involving young complainers does not map exactly that envisaged by the law reformers. They were concerned primarily with the imputation of indiscriminate consent on the basis of past consent. In the trials observed here, the ascription of sexual character does appear to aid the presentation of the complainer as consenting to the sex which is the subject matter of the charge. However, the focus is on presenting the complainer as someone who is likely to consent to the offence, not on the basis of past consent (although sometimes that does appear to be an issue), but more on the basis of her burgeoning sexuality, her awakening sexual interest, her sexual curiosity which is routinely associated with her young age. In other words, characterising the complainer as a 'sexual being' sets up the imputation of consent.

The Appearance of Consent

This leads me to the third set of research questions set out in the Introduction, that is those which cluster around the appearance of consent in the trials and the dominance of consent-based arguments put forward by the defence. It has been argued that rape-model arguments, with their strong emphasis on, and ways of defining and proving consent on the part of the complainer, albeit usually associated with rape trials involving adult complainers, are a common characteristic of sexual offence trials involving young complainers. This is despite the fact that consent is technically not an issue in such trials, ruled out on the basis of one or the other of the two rationales which underpin the non-consent of young women and girls. This study documents how throughout the trial, the defence are able to systematically manipulate and re-interpret evidence in ways that are designed to suggest that the complainer consented. It shows how the story of the consenting young complainer is built up through challenging and re-interpreting the signs of the crime and the complainer's account of what occurred, whilst consistently searching for evidence which can be construed as indicating consent.

Further, the question of consent haunts the plea in mitigation process in much the same way as it does the trial situation. There is a focus on the complainer, and the defence incorporate a suggestion of consent within the content of the plea which is used to shift blame away from accused and/or attribute responsibility on to the complainer. Similar sorts of issues to those that are used to show consent in a contested trial situation, such as

delay in reporting, and signs of force and resistance are drawn into pleas in mitigation. Such pleas, in many ways, provide a clear 'snap-shot' picture of common lines of defence questioning and argument in contested sexual offence trials.

Taken together, these similarities go some way to suggest that the paradoxical appearance of the issue of consent in contested trials is in fact there for a specific set of reasons. By raising the issue of consent at an early stage (that is, during the trial) its mitigating potential becomes more firmly realised should a guilty verdict ensue, and it may influence the sentencer to decide on a more lenient sentence. According to most of those legal practitioners interviewed, for that reason alone, raising the issue of consent is entirely justifiable. Of course, focusing on the issue of consent may, equally, raise enough doubt that it has the effect of destabilising the prosecution case, which in turn leads to an acquittal. Either way, the implication of consent may have a desired effect in terms of the defence case. Thus consent is an issue, not solely because of its relevance to the guilt of the accused, but also because it is thought by practitioners to mitigate seriousness of the offences and potentially reduce sentence.

Criminal Justice Implications

I address the use of sexual evidence (which it is argued is underpinned by a set of presumptions informed by a particular view of young female sexuality) within the context and logic of the adversarial system. In trying to draw together all the various strands of the thesis, however, much remains unanswered in terms of the effects and implications that this focus on young female sexuality may be having. In trying to redress this situation and seek some explanation, it is perhaps fruitful to turn again to the general principles of advocacy within the adversarial system and re-examine the logic of what goes on in a trial situation.

Constructing the Defence Case

It was stated in Chapter Three that advocacy is more about constructing and arguing a *case* than about ascertaining the truth of what may have occurred. As McBarnet (1981) argues, success or failure in court depends as much on the construction of the case as on the 'actual' case (that is, the original events).[2] At a superficial level essentially what one encounters in a criminal trial are a set of competing stories about what did or did not happen, and also - crucially in the cases documented here - differing stories about the complainer and the accused and their part in what (allegedly) occurred. These stories are used in the construction of the (prosecution or defence) case as a way of reconstructing and making explicable what happened. They are composed of, for example, statements drawn from

[2] McBarnet, D. (1981) *Conviction*

witness testimony, items of physical evidence, and statements by the complainer, that is, pieces of evidence which are introduced and examined over the course of the trial. But the content of these stories (and hence the constructed cases) are often fairly fluid and open to differing interpretation, and hence a key source of contention and argument. The relative strength, in evidential terms, of these (invariably conflicting) stories about events and individuals is really at the heart of the trial. However, to paraphrase Sanders (1987) who was writing in relation to the construction of the prosecution case, constructing a case is not entirely due to available evidence and the interpretation of that evidence, it owes much to the complex interplay between the respective roles of prosecution and the defence, the witnesses (particularly the complainer), the events in question, and the interpretation of those events. [3]

It was also stated in Chapter Three that adversarial demands are placed on the prosecution in terms of the burden of proof and the criteria for evidential sufficiency in terms of corroboration. On the other hand, the defence do not adhere to a criteria of evidential sufficiency nor do they have to 'prove' their case in the same way as the prosecution. They do not have to do anything more than 'put' their case. However, the 'duty' of the defence is to argue his or her client's case, and as such the adversarial demands upon the defence, although somewhat different from those placed upon the prosecution, are nonetheless fairly influential. The defence are necessarily creative in building up and interpreting their cases. Building up the defence case usually entails trying to dismantle the prosecution case. This is done in a number of ways; for example, by disputing the source or interpretation of evidence as was the case in some observed cases where the defence disputed that a lack of or damaged hymen was indicative of sexual behaviour; by putting forward an alternative explanation of the prosecution evidence, as in those cases where the defence suggested that marks of injury were a result of play rather than sex; by injecting ambivalence and hence confusion as, for example, in case 21 cited at length in Chapter Seven where the defence version of the complainer's hysteria and incoherence after an attempted rape was part of an elaborate plan to explain to her parents why she was late home after a night out with friends. This is all part of the 'logic' of the role of the defence, who will always be looking for any ambiguities and inconsistencies in the prosecution case and, because the complainer is usually the prosecution's key witness, in her account of what occurred. A main reason for this is that, since the truth or the falsity of what is said to have occurred can rarely be directly established, due to inherent difficulties of corroboration in this type of offence, then arguments in court frequently concern the credibility and veracity of the complainer.

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[3] Sanders, A, (1987) 'Constructing the Case for the Prosecution' *Journal of Law and Society* vol. 14

The essence of some defence cases is a set of interpretations of 'facts' which have to be created. This is largely done through defence questioning of witnesses, but also through alternative interpretations of physical evidence. Such questioning is designed to cause damage to the prosecution case, but at the same time convey the defence version. The way that questions are posed and the order in which they are asked can be very influential. Moreover, the way that witnesses answer defence questions in court can be substantially affected by the context and order of the questions put to them. This is particularly so in relation to the complainer. Often in the cases observed here the complainers were young, frightened and intimidated, and ill-equipped to avoid the pitfalls set by the defence line of questioning, let alone engage in the appropriate legal discourse to counter defence imputations of consent, unreliability and lack of credibility.

Sanders (1987) makes the point in relation to the case for the prosecution that although 'facts' are often far from concrete, cases do not emerge out of thin air.[4] This logic can also be applied to the construction of the defence case. Obviously, a number of different interpretations of 'fact' could arise from a particular situation or piece of evidence. For example, the presence of semen/injuries/ vaginal swelling in many cases cannot be denied - but the *reasons* for its presence can be debated endlessly. Cases are built out of what people say or think or remember about these 'facts' - which all can be shown to have competing or overlapping meanings, something which the defence try to capitalise upon. Similarly, it has been reiterated throughout this thesis that one piece of evidence can be used by the defence to perform a variety of functions, sometimes overlapping with other pieces of evidence which substantiate the defence case (or weaken the prosecution case). For example, the suggestion that the complainer is a sexual fantasiser is multifunctional in that it serves as an explanation for the allegation, whilst at the same time adds to the picture of the complainer as unreliable, and lacking in credibility. Similarly, a lack of hymen can be interpreted by the defence as evidence of consensual sex in relation to the subject of the charge. It may also be used to suggest evidence of past sexual behaviour. This in turn sets up a picture of the complainer as a sexual being, and hence she is cast as a 'type' of person about whom all sorts of assertions may be made. Evidence concerning any situation can provide the basis of a number of different arguments (although many seem to cohere around the notion of the *consenting* complainer). Several (diverse) lines of questioning may also lead to a particular construction of events.

Through a process of disputing, reinterpreting, recasting and confusing the defence attempt to reconstruct the prosecution case (and in particular the complainer's testimony) in a different way. All of these, fairly typical, 'reconstructivist' defence strategies are carried

[4] ibid.

out with the aim of casting doubt on the prosecution case. The point about a defence case is that, as part of its construction, the prosecution case is ruled out, or shown to be inappropriate. Some writers have maintained that precisely because the ultimate aim is to raise doubt about the prosecution case, then the defence case is necessarily reactive.[5] But observation of cases here suggest that this is not always so. The defence is required to put forward the story of events as told to him or her by the accused. Often what is deployed by the defence in this regard is not so much alternative interpretations of evidence - but sometimes evidence which is entirely 'new' or unrelated to that put forward in the prosecution case. Sometimes this stretches to implicitly or explicitly disregarding or discounting the prosecution case altogether - and presenting another altogether different 'story' or version of events. For example, those cases where marks or injuries were turned around into 'normal playground injuries, and those cases where the girl's account is reconstructed of into a defence story about a motive for false allegation. The defence aim is to derail the prosecution case by raising doubt. Presenting an alternative story introduces an element of speculation into the minds of the jury which may raise that doubt.

Similarly, it is also the case that evidence may be introduced by the defence during the course of the trial which appears to contradict other parts of the defence case. The apparently deliberate use of what could be called 'red herrings' are also understandable within the context of the 'logic' of the defence role. The introduction of red herrings injects ambiguity and causes confusion, and can be as effective at raising doubt as the reinterpretation of evidence.

All of these strategies are really a reflection of institutional practice. The defence have little choice - given their adversarial role - but to dispute 'facts', draw inferences, make assumptions, and offer alternative interpretations. However, on the basis of the observed cases some additional strategies used in the construction of the defence case can be identified. One aim appears to be to muster as much evidence *against* - as opposed to about - the complainer as possible, for example, by bringing in other witnesses who testify against her by referring to her past habits or behaviour; by attacking her credibility through the introduction of sexual evidence. Observation of cases revealed that the defence routinely try to undermine young complainers, to call them liars, and to seize on any aspect of their sexuality in an attempt to discredit them. Furthermore, and again on the basis of cases observed in this research, another defence strategy appears to be to bring in elements and components which are not strictly part of the charge at hand - but which are part of the general defence routine of other charges. This is most noticeable in relation to the issue of consent which, although not technically part of the charge in trials for statutory sexual

[5] ibid.

offences, is part of the defence routine in rape trials involving adult women. This finding is somewhat at odds with the view that cases are constructed specifically to refute the charge at hand.[6] Because the defence are not tied down in the same way as the prosecution, they have much more scope to creatively address the available evidence. Although power appears vested in the prosecution, as Sanders (1987) points out, in open court, the defence has all of the advantage.[7]

But the construction and presentation of the defence case does not always end with the demolition of the prosecution case. In several instances the defence were at pains to present a detailed alternative version of events which appeared plausible. This was somewhat surprising given that the role of the defence is merely to cast doubt on the prosecution case. Sometimes what seemed to be happening was an attempt by the defence to make their version 'fit the facts' - rather than, as one may expect, a sole focus on undermining the prosecution case. Giving a fuller version of a case - a more forceful and plausible reconstruction of the events - may have the effect of being more believable. The stronger the defence case, the better for defence purposes. On the other hand, one could also surmise that this is again an example of leading 'early mitigation' in a way similar to that discussed earlier in relation to the issue of consent. A defence case which proposes a full alternative may well offer more potential for mitigation than a defence case based solely on raising doubt in the prosecution case. Certainly, some interviewees felt that the fuller and more plausible the defence version of events, the more likely the jury would be swayed in favour of the defence case. But equally, they felt that the fuller the account, the more scope for seeding mitigating factors.

It is submitted that, in sexual offence cases involving young complainers, the construction of a defence case commonly entails some specific components. These include a focus on the sexuality of the complainer, a preoccupation with the complainer's sexual character, the deployment of images of female sexuality to convey sexual character, and the use of arguments to show consent. Of course, it is beyond the scope of this project to show how the jury or the court come to be swayed, let alone satisfied by the defence case. Some cases succeed in their objectives of acquittal, but clearly, not all cases result in acquittals. Some cases are very strong evidentially, and not all defence lawyers are that skilled at what they try to do. Looking at the resolution in terms of verdict reached at the end of the observed contested trials, it can be seen that 30 (that is, 57%) of the trials involved a guilty verdict. However, it will be recalled from Chapter Five that this does not mean that the accused was found guilty on *all* of the charges which formed the case. In 10 of these trials, the guilty verdicts were returned for reduced or less serious charges than the original charges. Whilst

[6] McBarnet, D. (1981)
[7] Sanders, A. (1987)

an analysis of returned verdicts in terms of the use of images and an emphasis on sexual character and consent is also way beyond the scope of this thesis, one may hazard (purely at the level of speculation) that they may well be having some effect on the decisions reached by juries.

Constructing a defence case does not in itself contravene any legal rules, on the contrary the defence are fulfilling their duty to the accused by laying out the defence case. However it is clear that some constructions constitute breaches of the 'shield' legislation. The general stated aim of the legislation is to prevent gratuitous and unnecessary questioning into aspects of complainer's sexual lives. Clearly this is not being adhered to, in that prohibited sexual evidence is led without reference to the legislation. In many ways this is unsurprising. Other research has shown how impervious rape and child sexual abuse are to legal reform.[8] The thesis provides further substantiation of this imperviousness and, at the same time, further lays bare the way in which female victims of sexual offences, both young and old, are treated in the courts. That such practices appear impervious to effective reform has undoubted policy implications. It raises serious questions concerning whether, within the context of the present system, there are any legislative means which would avoid the hostile treatment of complainers in the witness box, or unsubstantiated allegations about the complainants sexual character in a plea in mitigation.

Social Justice Effects

At the level of sociological analysis, this overt preoccupation with young female sexuality has effects both inside and outside of the criminal justice system. To turn now to look across the wider social landscape at what some of those other effects and implications may be at the level of what can be called social justice. I have repeatedly suggested that sexual offence cases are thoroughly imbued with images of female sexuality that are used both to characterise and depict the complainer, and also as a means of explaining the sexual event. This is a problem, not least because the use of such imagery is not good for the equality of young women and girls before the law. But also, and importantly, because it carries with it the presumption that the sexual assault is a result of (hetero)sexual passion and desire. From this perspective, the assault can be presented within criminal trials and also within a wider social context, as an inevitable event. This is not new in that feminists have for a long time been making similar arguments concerning the position of adult women in rape trials.[9] There is however, a slight difference of emphasis in that what is being deployed by the defence in these cases (that is, in both contested trials and guilty plea cases) is not the usual argument concerning uncontrollable male sexual urges that have precipitated the

[8] Adler, Z. (1987) *Rape On Trial* ; Temkin, J. (1987) *Rape and the Legal Process* ; Brown, et al (1993) *Sex Crimes On Trial*;

[9] Smart, C. (1995) *Law, Crime and Sexuality*

offence, but rather the offence is depicted as the fault of the young complainer's irresistible sexual curiosity and 'natural' sexual urge. The focus on her sexuality and associated evidence are used to substantiate the sexual act which forms the charge as one of (consensual) sexual passion (usually precipitated by the complainer). This in turn leads to an understanding and an explanation of the act as a result of sexual passion. This is damaging to women and girls because, not only does it ignore any possibility of harm and denies the coercive element involved in non-consensual sex, but it also situates rape and other forms of sexual assault within the context of 'normal' sexual behaviour.

This focus on the complainer's sexuality also means that the entire trial process is imbued with sex. It is a discourse of sex. The evidence is sexualised, as is the complainer. Smart (1995), writing about adult women describes the rape trial situation as "a specific mode of sexualisation of a woman's body".[10] At the same time, the complainer simultaneously invokes the natural/sexed women who is known to be emotional, irrational, and unreliable. This aptly describes the situation with young complainers. Within the trial, the young complainer constantly invokes, albeit unwittingly, cultural stereotypes of young female sexuality, and the related stereotypes of unreliability, subjectivity and mendacity that are associated with young girls. A particular identity, based on sexuality is constructed and ascribed to the complainer that has implications far beyond the courtroom.

The correlation of sex and sexuality in the court room is problematic for another reason. It has been argued here that young women and girls are constructed - and differentiated - in terms of their sexuality. Not only does this reek of essentialism, but it also has implications in terms of the social control and positioning of 'good' and 'bad' girls within a social and legal context. 'Good' girls are seen as deserving and saveable, 'bad' girls are constructed as the problem. By so doing, special classes of young women and girls are created, and responded to differently. Imposing differentiation on the basis of sexuality has implications in terms of young women and girls' recourse to law when alleging sexual assault. Currently, invoking the law can bring with it a whole set of further problems and difficulties for the complainer which exacerbate rather than ameliorate the original ordeal. In-court practices which equate sexual assault and sexuality and construct 'good' and 'bad' girls not only constitute highly distressing ordeals for the young complainer, but they can also potentially corrupt the system. Fear of the witness box may result in not reporting the sexual assault. Despite concerns with the unnecessary questioning and under-reporting being two of the reasons behind the Scottish law reforms, the testing procedure of giving evidence nonetheless remains a problem for those alleging sexual assault and desiring 'justice'.

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[10] Smart (1995) p. 83-84

CASE DETAILS

Full Contested Trials

No	Court	Age [1]	Initial Charge	Final Charge	Verdict	Sentence
1	High Court	8-9 (10)	Assault with intent to Rape	Indecent Assault	Guilty	5 years
2	Sheriff Summary	8-9 (13)	Lewd & Lib x 5	Lewd & Lib x 4	Guilty	Deferred
3	Sheriff Summary	13 (13)	s4 (i) Sex Offences Act	s4 (i) Sex Offences Act	Guilty	£50 fine
4	Sheriff Summary	7 (7)	Lewd & Lib	No case to answer	-----	-----
5	High Court	17 (17)	Rape	Rape	Not Guilty	-----
6	Sheriff Summary	16 (17)	Indecent Assault	Indecent Assault	Not Guilty	-----
7	Sheriff Summary	12 (12)	Indecent Exposure	Indecent Exposure	Not Proven	-----

[1] The first figure denotes the age of the complainer at the time of alleged offence(s). The figure in brackets refers to her age at the time that the case was heard in court

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
8	High Court	11 (11) 5 (5)	Rape Lewd & Lib	Rape Lewd & Lib	Guilty Guilty	Total of 8 years
9	High Court	3-5 (5)	Rape Lewd & Lib	Rape Lewd & Lib	Acquitted by Judge Acquitted by Judge	----- -----
10	High Court	17 (17) 17 (17)	Rape Assault with intent to rape	Rape Assault with intent to rape	Not Proven Guilty	----- 7 years[2]
11	Sheriff Summary	10 (11)	Lewd & Lib	Lewd & Lib	Guilty	£120 fine
12	High Court	14 (14)	Assault to Severe Injury and Danger to Life and Att Rape Attempted Murder	Assault to Severe Injury and Danger to Life and Att Rape Attempted Murder	Not Guilty Not Guilty	----- -----
13	Sheriff Summary	5 (5)	Lewd & Lib	Lewd & Lib	Not Proven	-----

[2] There were several other sexual charges involving other (older) complainers in this case. The sentence was one of 7 years in total, and it took into account all of the other offences for which the accused was found guilty

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
14	Sheriff Solemn	9-11 (11)	Lewd & Lib Contravention of Bail	Lewd & Lib Contravention of Bail	Guilty Guilty	20 months 3 months
15	Sheriff Summary	14 (15)	s4 (i) Sexual Offences Act	s4 (i) Sexual Offences Act	Guilty	Deferred
16	Sheriff Summary	8 (12)	Lewd & Lib	Lewd & Lib	Guilty (dels)	£150 fine
17	Sheriff Summary	15 (15)	Breach of Peace (indecency)	Breach of Peace (indecency)	Guilty (dels)	£80 fine
18	High Court	9-11 (12) 15 (17) 8-14 (14)	Lewd & Lib Incest s5 Sexual Offences Act s5 Sexual Offences Act Lewd & Lib Incest	Lewd & Lib Incest s5 Sexual Offences Act s5 Sexual Offences Act Lewd & Lib Incest	Guilty Guilty Guilty Guilty Guilty Guilty	3 years 3 years 2 years 2 years 3 years 5 years

Full Contested Trials (continued)

No	Court	Age		Initial Charge	Final Charge	Verdict	Sentence
19	High Court	15	(16)	Rape (2 accuseds)	Rape (2 accuseds)	Not Guilty	-----
20	High Court	9	(10)	Lewd & Lib	Lewd & Lib	Guilty	3 years
				Indecent Assault	Indecent Assault	Not Guilty	-----
		16	(16)	Breach of Peace (indecency)	Breach Of Peace (indecency)	Not Guilty	-----
		16	(16)	Breach of peace (indceency)	Breach of Peace (indecency)	Not Guilty	-----
		10	(10)	Indecent Assault	Indecent Assault	Guilty	3 years
21	High Court	14	(15)	Attempted Rape	Attempted Rape	Guilty	6 years
22	High Court	14	(14)	Rape alt s2A (i) Incest Act	Rape alt s2A (i) Incest Act	Not Guilty	-----
23	Sheriff Solemn	8	(9)	Lewd & Lib	Lewd & Lib	Guilty	9 months
24	Sheriff Summary	13	(13)	Indecent Exposure	Indecent Exposure	Guilty	Total of
		11	(11)	Indecent Exposure	Indecent Exposure	Guilty	£100 fine
		12	(12)	Indecent Exposure	Indecent Exposure	Guilty	
25	High Court	13	(14)	Assault with intent to rape	Assault with intent to rape	Not Proven	-----
				Rape	s4 (i) Sex Offences Act	Guilty	6 months

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
26	High Court	6-14 (14)	Rape	Rape	Guilty	15 years
			Lewd & Lib	Lewd & Lib	Guilty	7 years
			Assault with intent to Rape	Withdrawn	-----	-----
			Lewd & Lib	Lewd & Lib	Guilty	7 years
			Rape	Rape	Guilty	15 years
			s5 Sexual Offences Act	s5 Sexual Offence Act	Guilty	2 years
			Rape alt s2C Incest Act	s2C Incest Act	Guilty	7 years
			Rape alt s2C Incest Act	s2C Incest Act	Not Proven	-----
		5-10 (10)	Rape	Rape	Guilty	15 years
			Rape	Rape	Not Proven	-----
			Assault with intent to Rape	Assault with intent to Rape	Not Guilty	-----
						Total 15 years
27	Sheriff Summary	14 (15)	s4 (i) Sex Off Act (2 accs)	s4 (i) Sex Off Act (2 accs)	Not Guilty	-----
28	High Court	15 (15)	Rape	Rape	Not Guilty	-----
			Assault	Withdrawn	-----	-----
			Assault & Robbery	Assault & Robbery	Guilty	3 months
29	Sheriff Summary	13 (13)	Lewd & Lib	Lewd & Lib	Not Guilty	-----

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
30	High Court	8-16 (17)	Lewd & Lib s5 Sexual Offences Act Rape alt Incest	Lewd & Lib s5 Sexual Offences Act Incest	Not Proven Not Proven Not Proven	----- ----- -----
31	High Court	17 (17)	Rape Criminal Threats	Rape Criminal Threats	Guilty Not Guilty	5 years -----
32	High Court	16 (16) 16 (16)	Indecent Exposure Attempted Rape	Indecent Exposure Attempted Rape	Not Proven Guilty	----- 2 years
33	High Court	9-13 (13)	Lewd & Lib s5 Sexual Offences Act Rape Threatened Rape Offensive Weapon	Withdrawn Withdrawn Rape Threatened Rape Offensive Weapon	----- ----- Guilty Guilty Guilty	----- ----- 10 years 10 years 3 months Total 10 years
34	High Court	17 (17)	Rape Assault	Rape Assault	Not Proven Not Proven	----- -----

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
35	Sheriff Summary	13 (13)	s4 (i) Sex Off Act s10 Sex Off Acts (3 accuseds involved in both offences)	s4 (i) Sex Off Act 10 Sex Off Act	Guilty Guilty	1yr Prob -acc1 1yr Prob -acc2 50hrs CS-acc3
36	High Court	14 (14)	Rape	Rape	Not Proven	-----
37	High Court	14-15 (15)	Rape Indecent Assault	s4 (i) Sexual Offences Act Withdrawn	Guilty -----	1 yr deferred -----
38	Sheriff Summary	13 (13)	Indecent Assault Indecent Exposure	Indecent Assault Indecent Exposure	Guilty Guilty	Deferred Deferred
39	Sheriff Summary	14 (15)	s4 (i) Sexual Offences Act	No Case To Answer	-----	-----
40	High Court	17 (17)	Rape	Rape	Not Proven	-----

Full Contested Trials (continued)

No	Court	Age		Initial Charge	Final Charge	Verdict	Sentence
41	High Court	17	(17)	Attempted Rape	Deserted Pro Loco	-----	-----
42	High Court	14	(15)	Att Rape alt s4 (i) Sex Off	Indecent Assault	Guilty	1 year
43	Sheriff Solemn	12-14	(14)	s5 Sexual Offences Act Subornation	s5 Sexual Offences Act Withdrawn	Not Guilty -----	----- -----
44	Sheriff Summary	10 9	(11) (10)	Lewd & Lib Lewd & Lib	Lewd & Lib Lewd & Lib	Guilty Guilty	£150 fine £150 fine Total £300 fine
45	High Court	16	(17)	Rape	Deserted	-----	-----
46	High Court	15	(16)	Rape	s4 (i) Sexual Offences Act	Guilty	1 yr deferred
47	High Court	16	(17)	Rape	Rape	Not Guilty	-----

Full Contested Trials (continued)

No	Court	Age	Initial Charge	Final Charge	Verdict	Sentence
48	Sheriff Summary	17 (17)	Indecent Behaviour	Withdrawn	-----	-----
49	Sheriff Solemn	7-16 (17)	Indecent Assault	No Case To Answer	-----	-----
			Lewd & Lib	Lewd & Lib	Guilty	Deferred
			s5 Sexual Offences Act	s5 Sexual Offences Act	Guilty	Deferred
			s5 Sexual Offences Act	No Case To Answer	-----	-----
50	Sheriff Solemn	17 (17)	Assault with intent to Rape	Assault with intent to Rape	Not Guilty	-----
51	High Court	13 (13)	Rape	s3 Sexual Offences Act	Guilty	Total of
			Contravention Bail	Contravention Bail	Guilty	100 hrs CS
52	High Court	15 (15)	Rape	Indecent Assault	Guilty	5 yrs - acc 1
			Indecent Assault	Indecent Assault	Guilty	5 yrs - acc 2
			Rape	Rape	Guilty	8 yrs - acc 3
			(4 accuseds were involved)			6 yrs - acc 4
53	High Court	15 (15)	Assault and Rape	Assault and Rape	Not Guilty	-----

Guilty Plea Cases

No	Court	Age		Initial Charge	Final Charge	Type of Plea	Sentence
54	High Court	9-12	(15)	s3 Sexual Offences Act	s3 Sexual Offences Act	Trial day Plea	Life
				s3 Sexual Offences Act	s3 Sexual Offences Act		Life
				s3 Sexual Offences Act	Withdrawn		-----
				s5 Sexual Offences Act	s5 Sexual Offences Act		1 year
		7-8	(11)	Lewd & Lib	Lewd & Lib		6 months
		6	(6)	Lewd & Lib	Lewd & Lib		6 months
		10	(11)	Lewd & Lib	Lewd & Lib		6 months
		8	(8)	Lewd & Lib	Lewd & Lib		6 months
		6-7	(7)	Lewd & Lib	Lewd & Lib		6 months
		7-8	(8)	Lewd & Lib	Lewd & Lib		6 months
							Total Life
55	High Court	11-12	(13)	Incest alt s3 Sex Off Act	Indecent Assault	Trial day Plea	3 years Probation

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
56	High Court	11-14 (15)	Lewd & Lib	Lewd & Lib (with dels)	Trial day Plea	4 years
			s5 Sexual Offences Act	s5 Sex Off Act (with dels)		18 months
			Rape	Indecent Assault		4 years
			Rape	Indecent Assault		4 years
			Rape	Indecent Assault		4 years
			s5 Sexual Offences Act	s5 Sex Off Act (with dels)		6 months
					Total	4 years
57	High Court	9-13 (13)	Lewd & Lib	Lewd & Lib	Trial day Plea	Total of
			Rape	Rape		10 years
		12 (12)	Shameless & Ind Conduct	Shameless & Ind Conduct		
		16 (16)	Shameless & Ind Conduct	Shameless & Ind Conduct		
		14 (14)	Indecent Assault	Indecent Assault		
58	High Court	5-9 (10)	Incest	Incest (with dels)	Trial day Plea	5 years
			Lewd & Lib	Lewd & Lib (with dels)		2 years
			Lewd & Lib	Lewd & Lib (with dels)		2 years
			s2A (i) Incest Act	Not Guilty (accepted)		-----
		5 (6)	Incest	Not Guilty (accepted)		-----
			Lewd & Lib	Lewd & Lib (with dels)		2 years
			s2A (i) Incest Act	Not Guilty (accepted)		-----
			s2A (i) Incest Act	Not Guilty (accepted)		-----
					Total	5 years

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
59	High Court	13-16 (17)	Ind Ass alt s5 Sex Off Act Rape alt s2A Incest Act Att Rape alt s2A Incest Act Assault x 3 Theft x 3 Contravention Bail	Not Guilty (accepted) Not Guilty (accepted) s2A Incest Act Not Guilty (accepted) Not Guilty (accepted) Con travention Bail	Trial day Plea	----- ----- Hosp Order ----- ----- Hosp Order
60	High Court	15 (15)	Attempted Rape	Attempted Rape	Trial day Plea	1 yr deferred
61[3]	High Court	10-12 (14)	Lewd & Lib s5 Sexual Offences Act	Lewd & Lib s5 Sexual Offences Act	Trial day Plea	6 months 18 months Total 18 months
62	High Court	11 (11)	Lewd & Lib s3 (i) Sexual Offences Act	Lewd & Lib s3 (i) Sexual Offences Act	Late Plea	Total of 15 months
63	Sheriff Solemn	8 (9)	Lewd & Lib	Lewd & Lib (with dels)	Trial day Plea	1 year Prob

[3] This case also involved two other complainers who, although children at the time of the sexual offences, were adult women at the time the case was heard.

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
64	High Court	5-7 (7)	Rape Lewd & Lib Rape	Rape Not Guilty (accepted) Not Guilty (accepted)	Trial day Plea	8 years ----- -----
65	High Court	12 (12) (2 complainers)	Abduc, Ass & AWIR Contravention Firearms Contravention Firearms Contravention Bail	Assault Contravention Firearms Contravention Firearms Contravention Bail	Trial day Plea	2 years 2 years 6 months 3 months
66[4]	High Court	11 (12)	Attempted Rape	Not Guilty (accepted)	Trial day Plea	-----
67	High Court	13-14 (16) 12-16 (17)	Incest alt s5 Sex Off Act Incest	s5 Sexual Offences Act Incest (with dels)	Trial day Plea	1 year 3 years Total 3 years
68	Sheriff Summary	9 (9)	Lewd & Lib	Lewd & Lib	Late Plea	£150 fine

[4] This case also involved a charge of Attempted Rape of an older woman, who was the aunt of the young complainer. The accused pled guilty to a reduced charge of Indecent Assault on the older woman and received a 15 month sentence

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
69	High Court	12-13 (13)	Rape	Not Guilty (accepted)	Trial day Plea	-----
			Rape	Not Guilty (accepted)		-----
			s5 Sexual Offences Act	Not Guilty (accepted)		-----
			s3 Sexual Offences Act	s3 Sex Off Act (with dels)		Total of
			Contravention Bail x 2	Contravention Bail x 2		4 years
70	High Court	10-14 (14)	Lewd & Lib	Lewd & Lib (with dels)	Trial day Plea	4 years
			Incest	Not Guilty (accepted)		-----
			Lewd & Lib	Lewd & Lib (with dels)		18 months
			s2A Incest Act	Not Guilty (accepted)		-----
					Total	4 years
71[5]	High Court	6 (7)	Lewd & Lib	Lewd & Lib	Trial day Plea	Total of
		11 (11)	Lewd & Lib	Lewd & Lib		3 years
		10 (10)	Lewd & Lib	Lewd & Lib		
		4 (5)	Breach of Peace (indecency)	Breach of Peace (indecency)		
72	High Court	10-16 (17)	Lewd & Lib	Not Guilty (accepted)	Trial day Plea	-----
			s5 Sexual Offences Act	Not Guilty (accepted)		-----
			Incest	Not Guilty (accepted)		-----
			s5 Sexual Offences Act	s5 Sexual Offences Act		18 months

[5] This case also involved nine other charges of lewd, indecent and libidinous practices and behaviour involving young boys under the age of 11 years.

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
73	High Court	12-16 (17)	Indecent Assault	Not Guilty (accepted)	Trial day Plea	-----
			Incest	Not Guilty (accepted)		-----
			s2B Incest Act	s2B Incest Act (with dels)		5 years
		11-13 (13)	Assault with intent to Rape	Ass w i Rape (with dels)		3 years
			Lewd & Lib	Lewd & Lib (with dels)		3 years
			s3 Sexual Offences Act	Not Guilty (accepted)		-----
			Assault	Assault		3 years
			Lewd & Lib	Lewd & Lib (with dels)		2 years
			s4 Sexual Offences Act	Not Guilty (accepted)		-----
					Total	5 years
74	High Court	11-13 (14)	Lewd & Lib	Not Guilty (accepted)	Trial day Plea	-----
			s3 Sexual Offences Act	Not Guilty (accepted)		-----
			Incest	Incest (with dels)		18 months
			Contravention Bail	Contravention Bail		3 months
					Total	18 months
75	High Court	6 (7)	Attempted Rape	Attempted Rape (with dels)	Trial day Plea	Total of
		13 (13)	Indecent Assault	Indecent Assault (with dels)		4 years

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
76	Sheriff Solemn	19mths (2)	Lewd & Lib	Lewd & Lib	Trial day Plea	Deferred
77	High Court	11-14 (15)	Lewd & Lib	Lewd & Lib	Trial day Plea	Deferred
			s5 Sexual Offences Act	s5 Sex Off Act (with dels)		Deferred
			s2C Incest Act	s2C Incest Act (with dels)		Deferred
78	Sheriff Summary	12 (12)	Indecent Exposure	Ind Exp (with dels)	Trial day Plea	Deferred
		12 (12)	Indecent Exposure	Ind Exp (with dels)		Deferred
		11 (11)	Indecent Exposure	Ind Exp (with dels)		Deferred
		10 (10)	Indecent Exposure	Ind Exp (with dels)		Deferred
		12 (12)	Assault	Not Guilty (accepted)		-----
			Indecent Exposure	Ind Exp (with dels)		Deferred
		11 (11)	Indecent Exposure	Ind Exp (with dels)		Deferred
79	High Court	13-14 (15)	Rape	Rape (with dels)	Trial day Plea	7 years
			Rape	Not Guilty (accepted)		-----
			s4 Sexual Offences Act	s4 Sex Off Act (with dels)		2 years
		14 (15)	Indecent Assault	Not Guilty (accepted)		-----
			s2A Sexual Offences Act	Not Guilty (accepted)		-----
						Total 7 years

Guilty Plea Cases (continued)

No	Court	Age		Initial Charge	Final Charge	Type of Plea	Sentence
80	High Court	7-14	(14)	Attempted Rape	Not Guilty (accepted)	Trial day Plea	-----
				Lewd & Lib	Lewd & Lib (with dels)		2 years
				Attempted Rape	Not Guilty (accepted)		-----
				Rape	Not Guilty (accepted)		-----
				Lewd & Lib	Lewd & Lib (with dels)		2 years
				Rape	Rape (with dels)		9 years
				s3 Sex Offences Act	s3 Sex Off Act (with dels)		9 years
				s5 Sexual Offences Act	s5 sex Off Act (with dels)		2 years
				Rape	Not Guilty (accepted)		-----
				Attempted Rape	Attempted Rape (with dels)		2 years
		14	(15)	s4 Sexual Offences Act	Not Guilty (accepted)		-----
				s4 Sexual Offences Act	Not Guilty (accepted)		-----
						Total	9 years
81	Sheriff Solemn	13	(14)	Lewd & Lib	Lewd & Lib (with dels)	Trial day Plea	Deferred
				Lewd & Lib	Lewd & Lib (with dels)		Deferred
				s5 Sexual Offences Act	s5 Sexual Offences Act		Deferred
				s5 Sexual Offences Act	Not Guilty (accepted)		-----
				Lewd & Lib	Lewd & Lib (with dels)		Deferred
				Lewd & Lib	Lewd &Lib (with dels)		Deferred
				s5 Sexual Offences Act	Not Guilty (accepted)		Deferred
82	High Court	9	(9)	s3 Sexual Offences Act	s3 Sexual Offences Act	Trial day Plea	Deferred

Guilty Plea Cases (continued)

No	Court	Age		Initial Charge	Final Charge	Type of Plea	Sentence
83	High Court	13	(13)	Rape	Not Guilty (accepted)	Trial day Plea	-----
				Rape & Robbery	Rape & Robbery (with dels)		Life[6]
		14	(14)	Attempted Rape	Not Guilty (accepted)		-----
84	High Court	12	(13)	Rape alt s2 Incest Act	s2A Incest Act	Trial day Plea	2 years
				Lewd & Lib	Not Guilty (accepted)		-----
85	Sheriff Summary	14	(15)	Indecent Assault	Indecent Assault (with dels)	Trial day Plea	£225
86[7]	High Court	16	(16)	AttemptedRape	Attempted Rape	s102	18 months

[6] There were sixteen other charges of a non-sexual nature in this case, including five charges of Assault and Robbery - all committed against women; two charges of Theft by Housebreaking; one charge of Theft by Opening a Lockfast Place; two breaches of s41 of the Police (Scotland) Act 1967 (resisting arrest) ; one charge of contravening s1 of the Prevention of Crime Act 1953 (carrying offensive weapon); two charges of Breach of the Peace; and contravention of the Bail (Scotland) Act. There was one other charge of Assault with Intent to Rape & Robbery against an adult woman. Pleas of not guilty were accepted for seven of these other charges, and guilty pleas, with deletions, were submitted for the remainder. The final sentence was life imprisonment.

[7] There were also four other charges in this case, three charges of Rape and one of Rape and Attempted Murder. All involved adult women complainers. The final sentence was life imprisonment

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
87	High Court	5-15 (16)	Lewd & Lib s3 Sexual Offences Act s4 Sexual Offences Act s5 Sexual Offences Act	Lewd & Lib s3 Sexual Offences Act s4 Sexual Offences Act s5 Sexual Offences Act	s102	3 months 5 months 18 months 18 months Total 18 months
88	High Court	4 (5) 10-11 (11)	Lewd & Lib Lewd & Lib Contravention Bail	Lewd & Lib Lewd & Lib Contravention Bail	s102	4 years 4 years 3 months Total 4 years
89	High Court	14-16 (16) 12-15 (15)	s5 Sexual Offences Act Indecent Assault Lewd & Lib Shameless & Indecent	s5 Sexual Offences Act Indecent Assault Lewd & Lib Shameless &Indecent	s102	18 months 3 years 3 years 3 years Total 3 years
90	High Court	13-15 (17)	s5 Sexual Offences Act s2A Incest Act	s5 Sexual Offences Act s2A Incest Act	s102	18 months 2 years Total 2 years
91	High Court	15 (15)	s2C Incest Act	s2C Incest Act	s102	1 year

Guilty Plea Cases (continued)

No	Court	Age	Initial Charge	Final Charge	Type of Plea	Sentence
92	High Court	15-17 (17)	s2A Incest Act	s2A Incest Act	s102	3 years
93[8]	High Court	8-11 (14)	Lewd & Lib	Lewd & Lib	s102	3 years
94	High Court	16 (17)	s2A Incest Act	s2A Incest Act	s102	1 year

8 This case also involved similar charges against another young women who was 8-15 years at the time of the offences, but was in her twenties by the time that the case came to court.

APPENDIX II

LAW REFORM (MISCELLANEOUS PROVISIONS) (SCOTLAND) ACT 1985

S.36(1) After section 141A of the Criminal Procedure (Scotland) Act 1975 there shall be inserted the following sections :

S.141A (1) In any trial of a person on a charge to which this section applies, subject to section 141B, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer:

(a) is not of good character in relation to sexual matters;
(b) is a prostitute or an associate of prostitutes; or
(c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge.

S141A (2) This section applies to a charge of committing or attempting to commit any of the following offences, that is to say:

(a) rape;
(b) sodomy;
(c) assault with intent to rape;
(d) indecent assault;
(e) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);
(f) an offence under section 106(1)(a) or 107 of the Mental Health (Scotland) Act 1984 (unlawful sexual intercourse with mentally handicapped female or with patient);
(g) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 1976:
(i) section 2 (procuring by threats, etc.);
(ii) section 3 (unlawful sexual intercourse with girl under 13);
(iii) section 4 (unlawful sexual intercourse with girl under 16);
(iv) section 5 (indecent behaviour towards girl between 12 and 16);
(v) section 8 (abduction of girl under 18);
(vi) section 9 (unlawful detention of female); or
(h) an offence under section 80(7) of the Criminal Justice (Scotland) Act 1980 (homosexual offences).

S.141A (3) In this section 'complainer' means the person against whom the offence referred to in subsection (2) above is alleged to have been committed.

S.141A (4) This section does not apply to questioning, or evidence being adduced, by the Crown.

S.141B (1) Notwithstanding the terms of section 141A, in any trial of a person on a charge to which that section applies, where the court is satisfied on an application by that person:

(a) that the questioning or evidence referred to in section 141A (1) above is designed to explain or rebut evidence adduced, or to be adduced, otherwise than by or on behalf of that person.

(b) that the questioning or evidence referred to in section 141A (1)*(c)* above:
(i) is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming the subject-matter of the charge; or
(ii) is relevant to the defence of incrimination; or

(c) that it would be contrary to the interests of justice to exclude the questioning or evidence referred to in section 141A (1) above, the court shall allow such questioning or, as the case may be, admit such evidence.

S.141B (2) Where questioning or evidence is or has been allowed or admitted under this section, the court may at any time limit as it thinks fit the extent of that questioning or, as the case may be, admit such evidence.

S.141B (3) Any application under this section shall be made in the course of the trial but in the absence of a jury, the complainer, any person cited as a witness and the public.

S.346A and S.346B cover summary procedure. The difference from S.141A and S.141B (above) which cover solemn procedure is only in the offences covered.

S.346A (2) This section applies to a charge of committing or, in the case of paragraphs *(b)* to *(g)*, attempting to commit any of the following offence, that is to say:

(a) attempted rape;
(b) sodomy;
(c) assault with intent to rape
(d) indecent assault;
(e) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);
(f) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 1976:
(i) section 2 (procuring by threats, etc.);
(ii) section 3 (unlawful sexual intercourse with girl under 13);
(iii) section 4 (unlawful sexual intercourse with girl under 16);
(iv) section 5 (indecent behaviour towards girl between 12 and 16);
(v) section 8 (abduction of girl under 18);
(vi) section 9 (unlawful detention of female); or
(g) an offence under section 80(7) of the Criminal Justice (Scotland) Act 1980 (homosexual offences).

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